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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

DONNA CURLING, ET AL.,	:	
	:	
PLAINTIFFS,	:	
vs.	:	DOCKET NUMBER
	:	1:17-CV-2989-AT
BRAD RAFFENSPERGER, ET AL.,	:	
	:	
DEFENDANTS.	:	

TRANSCRIPT OF BENCH TRIAL - VOLUME 17 PROCEEDINGS

BEFORE THE HONORABLE AMY TOTENBERG

UNITED STATES DISTRICT SENIOR JUDGE

FEBRUARY 1, 2024

MECHANICAL STENOGRAPHY OF PROCEEDINGS AND COMPUTER-AIDED

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UNITED STATES DISTRICT COURT
OFFICIAL CERTIFIED TRANSCRIPT

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P R O C E E D I N G S

(Atlanta, Fulton County, Georgia; February 1, 2024.)

THE COURT: Good morning. Good morning. Have a seat, everybody.

Well, I can't say we sprinted to this day. But a lot of hard work was put to get to this day by all counsel and parties.

And I just want to say from the start, I know there's a lot of passionate feelings about the issues involved in elections and in this case. And whatever the result is, it is obviously we are -- I know that all counsel devoted everything that they had to try and present the best of their case, what they view the law to be, and we're very -- for all the tensions and conflicts in our society and in this case and courtrooms, we're still very fortunate to have a functioning legal system, where people can actually present these conflicts and these positions.

And the law is an evolving -- is ever evolving, and it is better than the alternatives of the street. And really it is a -- as hard as this has been -- and sometimes apparently only I felt the conflict because the lawyers were all used to their -- their friendship and fighting -- that I think that really that counsel did an extraordinary job in presenting their cases.

And I want to thank them. I want to thank -- say

1 that also I know that the underlying parties have strong
2 concerns. And I completely recognize that on all sides. It is
3 what makes this case so hard.

4 But it also represents an effort in democracy to
5 confront these issues. And as I said, whatever happens, it is
6 all -- all an evolving piece in what is happening in our
7 country. And I hope that everyone keeps that -- I mean, the
8 media is a different thing. But I think all the citizens here
9 who have been engaged in one form or another, at minimum, will
10 feel that they have been heard.

11 And hopefully they really -- everyone recognizes
12 that, that they have participated in a very vigorous way.

13 And I am looking forward to hearing oral argument.
14 So let's proceed.

15 The notebook manufacturers are very happy also.

16 MR. CROSS: Paper. Lots of paper.

17 THE COURT: I mean, the endless notebooks. I've got
18 them stacked over there. They say more and more and more
19 cases. All right.

20 MR. CROSS: Your Honor, one quick question. The
21 request on the Fortalice report, I assume you want to deal with
22 that later?

23 THE COURT: Thank you for raising that. I think it
24 would make more sense to do it later unless you are --

25 MR. CROSS: We don't need it.

1 THE COURT: I mean, I am -- I think that we're
2 relatively prepared to rule. But we had some -- just a few
3 more legal things that we wanted to check before we did.

4 MR. CROSS: Okay.

5 THE COURT: But so I want to reaffirm that the
6 question of the -- whether the 2019 Fortalice record should be
7 released to the plaintiffs so they could introduce it remains
8 an open issue. And the record remains open to the resolution
9 of that, and it may still be submitted depending on the Court's
10 ruling.

11 Just as I already affirmed before, that the other
12 matters that were outstanding -- there were a few other matters
13 that were outstanding that the record remains -- has to be
14 ultimately resolved.

15 MR. CROSS: Okay.

16 THE COURT: All right. But I identified those
17 yesterday.

18 MR. CROSS: Thank you, Your Honor.

19 May it please the Court.

20 THE COURT: I want to just let the audience know what
21 they are in for.

22 I allocated two hours to each side. And they can do
23 as they fit -- see fit with that. This is because we had
24 multiple sets of attorneys.

25 Additionally, Mr. Davis retained separate counsel

1 very late in the game. But Mr. Oles has been very professional
2 about trying to assume those responsibilities and has somewhat
3 different issues that he has raised. So I'm giving him
4 15 minutes. And if he runs over some, I have told him I will
5 be lenient.

6 So I don't know how you're breaking that up. We will
7 take a short lunch, slash, snack break. But it is really not
8 going to be more than about 25 minutes. We've got wonderful
9 vending machines.

10 MR. CROSS: I think we're going to try to fix the
11 technical issue real quick.

12 **(There was a brief pause in the proceedings.)**

13 CLOSING ARGUMENT

14 MR. CROSS: All right. Good morning, Your Honor.

15 First and foremost, thank you to the Court for the
16 support and thank you to everyone. It has been a long and
17 arduous journey for everyone to get here, obviously in our
18 minds quite important, both for us, for our clients, for our
19 experts, and ultimately for the public.

20 Let me start. Your Honor is intimately familiar with
21 the law. I'm not going to spend much time on this. What I do
22 want to emphasize is the quote from the U.S. Supreme Court in
23 *Reynolds v. Sims*, that the right to vote includes the right to
24 have the ballot counted. And that is critically important in
25 this case.

1 Because as we have heard the State put on their case,
2 there seems to be a dispute about that. That the State's view
3 is the right to vote ends at casting a vote. And beyond that,
4 nothing more is required. And, in fact, they have been
5 explicit. The defense they offered, there is no legally
6 protected interest in verifying one's vote or in voting on a
7 reasonably secure system, in a world, Your Honor, where you are
8 voting on any manner of electronic equipment, particularly
9 where the machine itself is creating your ballot, in a world
10 where we have advanced persistent threats, as we have heard,
11 both from foreign and domestic actors. And we will walk
12 through how substantial those risks are in this system in this
13 state.

14 If a voter cannot verify what is on their ballot, if
15 they cannot be sure that the ballot of record reflects their
16 selections, which is what we're talking about, then there is no
17 right to ensure that your vote is counted as cast.

18 And if it cannot be cast in a system that is at least
19 reasonably secure, then the most that you have gotten from the
20 State is the ability to cast a vote. Because a system that is
21 not at least reasonably secure, the only alternative is
22 unreasonably secure. And that cannot be what satisfies the
23 constitutional right and where we are today in this world in
24 this state with this system. But that is the State's position.

25 Your Honor has talked about this in the past, going

1 as far as back as 2018, emphasizing the wounds here. And where
2 we find ourselves, Your Honor, is far deeper wounds to the
3 right to vote than anyone ever anticipated.

4 Now, there are a variety of ways to vote. Georgia is
5 one of only two states that does it in this way, with these ICX
6 particular BMDs.

7 The simplest way, of course, is to do what we have on
8 the screen, which is what almost everyone else in the country
9 does. You just print a piece of paper. You fill in some
10 bubbles with a pen. Everyone is familiar with this. Probably
11 most people have taken tests in this way growing up through
12 school. It is not complicated. It is not a surprise. And it
13 works.

14 And, in fact, their own expert, Dr. Ben Adida, says
15 this is what he recommends. He wouldn't say always, but he did
16 say 99.9 percent of the time to his own clients.

17 This is what they force on voters. The State does.
18 And let me be clear about this. It is the Secretary of State
19 and the State Election Board, but in particular the Secretary
20 that does this. Not the legislature. I'll explain why that
21 matters.

22 There are a variety of burdens. The first is the
23 burden of having to vote on the BMD. Completely unnecessarily
24 forcing a computer between the voter and themselves. You can
25 see how it works. You put in the voter card at the bottom.

1 You make your selection here. One of the selections they would
2 make, constitutional amendment. This is from an actual ballot
3 in Georgia. A voter might select no on the constitutional
4 amendment.

5 And then at the end, they have a review screen. So
6 they have to make these selections on a computer screen. Then
7 they have to review it on the computer screen.

8 With a hand-marked paper ballot, that is not required
9 at all. You fill it out yourself. You could review it to see
10 if you made a mistake. But you know that the selections on
11 there are yours.

12 Then we get to the next burden. Now they have to
13 review it a second time, because they have to print it, because
14 that is what is going to be cast. And as to actually being
15 able to review it, we get to the third burden, which is, as we
16 have heard, they cannot actually review this.

17 Study after study after study shows that voters
18 either don't or can't and the most logical explanation for why
19 most voters don't is because they know they can't or maybe they
20 forget. But again, with a hand-marked paper ballot, none of
21 this is required or necessary because they marked the ballot.

22 Here, Your Honor, again they have to review their
23 selection. Simplicity; right? On the left, simple hand-marked
24 paper ballot, it is confirmed, voter verified, the moment they
25 are done filling it out.

1 On the right, they have no idea what is buried in
2 that QR code which is what gets tabulated. And then you look
3 at the selections, the text here. They are not even told the
4 information that was available to them. They are only told the
5 candidate shows up. Certainly someone is going to remember
6 whether they voted for Donald Trump or Joe Biden. But as you
7 get deeper into this and you have a variety of constitutional
8 questions, they have to remember which question is which and
9 how they answered it.

10 And in case folks didn't notice, we swapped the
11 answer on constitutional Number 1. The vote that we cast on
12 the BMD was no. Here it is yes. We'll leave it to the folks
13 in the room as to how many actually spotted that.

14 Imagine trying to do that as a voter in a voting
15 booth with the stress of everything going on, trying to be
16 quick and to read all of this. It is not realistic, and every
17 study shows that.

18 The other point here as a threshold matter, Your
19 Honor, is the principal defense they have offered is that the
20 voting system is air-gapped, that the BMDs are never connected
21 to the internet.

22 The last thing we heard in this trial from their last
23 witness, the most senior secretary official to show up,
24 absolutely drove a truck through that. Because what he said is
25 they now have Poll Pads that are connected to the internet

1 through a cellular connection.

2 How does that system work? When a voter shows up,
3 they get a voter card that is plugged into the Poll Pad that
4 verifies that they are allowed to vote, that identifies the
5 ballot style that is supposed to show up on the screen. That
6 voter card is then plugged into the BMD as we just saw.

7 So in 2020 alone, we had -- what? -- 4, almost
8 5 million voters. If we expect a similar turnout this year,
9 that is 5 million voters. Take out the number that are
10 absentee, about 1.3. Let's just say millions of voters are
11 going to connect each BMD to the internet every single time
12 they vote.

13 And what did Dr. Halderman demonstrate? How you can
14 hack the machine simply through the use of putting the cards
15 into the machine. It will happen every time it is voted. And
16 this has already been happening we heard from Mr. Sterling in
17 elections already. They fundamentally do not understand
18 election security, and it is frightening.

19 This is what Your Honor ordered in 2019. To refrain
20 from the use of the GEMS DRE system in conducting elections
21 after 2019. The only thing that we seek different here is to
22 replace GEMS and DRE with the Dominion ICX and printers.
23 Otherwise, the relief is the same.

24 We'll talk through additional, lesser-included relief
25 that the Court can order particularly in the short-term.

1 Also, Your Honor, in your summary judgment decision,
2 you have a very great summary of sort of the four factual
3 pillars that led to your 2019 decision. Each of those factual
4 pillars is present today, but in the words of Joseph Kirk, on
5 steroids.

6 Your Honor pointed out that voters could not verify
7 their ballots in the DRE system. Well, that remains true here.
8 They can't verify the QR code. And as we have seen, they can't
9 even verify the human readable text. So it still is today a
10 ballot that is not voter verified and cannot be.

11 Your Honor pointed out the failure to implement
12 critical software patches to address cybersecurity
13 vulnerabilities. It is far worse here.

14 The critical vulnerabilities that Dr. Halderman has
15 identified and CISA has identified are exponentially worse than
16 what we saw with the GEMS system. Your Honor pointed out the
17 slow and ineffective response to a data breach.

18 The KSU data breach, to say that it pales in
19 comparison to Coffee County, is to put it mild. And the
20 State's reaction, even after we brought it to their attention,
21 was to say it didn't happen.

22 And then as Mr. Blanchard said, he was told don't
23 investigate this, hold off. And to this day, there has never
24 been an investigation by the Secretary's office or the SEB only
25 referring it to the GBI after we developed the record.

1 Lastly, Your Honor found an insufficient remedial
2 action. CISA has told them a dozen different things they
3 needed to do almost two years ago. They haven't done it. So
4 all of the factual pillars for the same relief we seek today
5 are present but on steroids.

6 These are the elements, Your Honor. There is no
7 dispute about this. The only reason I pause here is just to
8 say I'm not going to march through each individual element.
9 Because, as we have maintained and Your Honor acknowledged in
10 the summary judgment decision, the standing elements often
11 overlap with the merits in this case.

12 So I am going to walk through specific elements on
13 traceability, redressability. And then, of course, the injury
14 in the Anderson-Burdick analysis overlap heavily.

15 Traceability. All we need to show, Your Honor, is a
16 fairly traceable connection between our injury and their
17 conduct. That is easily done here. It cannot be reasonably
18 disputed, Your Honor.

19 The State, the legislature, mandated election ballot
20 markers. This is where I want to be clear. They are telling
21 Your Honor that we're asking you to contravene the decision of
22 the legislature. That is not accurate. Because the
23 legislature is not the one that mandated these BMDs as they are
24 designed, configured, and administered in the State. And that
25 is all we're asking.

1 We're not asking Your Honor to enter an order that
2 says BMDs cannot be used at all. It is a very precise factual
3 record we have created.

4 And who chose these BMDs in this configuration? Who
5 is responsible for maintaining them? The Secretary's office.
6 This is the contract that the Secretary negotiated and signed.

7 Gabe Sterling and Ryan Germany in particular were the
8 ones that drove this decision, that drove the terms of that
9 agreement. And it is that contract that governs the BMDs that
10 are used across the State and the Secretary's office mandates
11 are used.

12 Now, we have said we would like obviously some
13 changes to that. Stop using the BMD, the ICX, and the printer.
14 Well, they say they decide that, the Secretary's office and the
15 State Election Board. Only the Secretary of State can
16 determine whether any election equipment is modified, changed,
17 or upgraded. That is why they are in this case because they
18 are the ones that make that decision, having forced this on the
19 counties and the voters.

20 Even beyond that, Your Honor, Georgia law, in the
21 wisdom of the legislature, recognizing that there could be a
22 time when, in the words of Chris Harvey, the BMDs are unsafe to
23 use. And the way the legislature decided to protect the right
24 to vote was to say that the county superintendents make that
25 decision.

1 But since 2018, it has been the position of the
2 Secretary's office that the State decides that. They are the
3 only ones contravening Georgia law is the Secretary's office
4 telling the counties for years that they are not allowed to do
5 what the legislature in its wisdom to protect the right to vote
6 told them is their decision. And the Court should enjoin them
7 from doing that.

8 How does it -- how is it traceable to the State? I'm
9 not going to spend much time on this. Suffice to say, Your
10 Honor, they are the ones -- they actually introduced this, the
11 poll worker manual. They determine at a granular level how the
12 elections are run, from setting up the machines, how they are
13 supposed to be secured, the seals, through the election itself.

14 And why did they do this? Why is it so important to
15 the Secretary's office to govern elections in this way? Well,
16 Blake Evans said it. This is why they do it. Because allowing
17 counties to have different systems requires that counties have
18 more autonomy, which makes it more difficult for the Secretary
19 to step in if a county is underperforming.

20 So underperforming, for example, could be allowing
21 what happened in Coffee County. It could be allowing the use
22 of machines with broken or missing seals. All of the things
23 where the Secretary is the one that is supposed to step in and
24 to protect the right to vote.

25 They don't want the counties to have autonomy. Yet

1 they have stood in this court and told Your Honor that the
2 counties are the ones with the autonomy and that they are the
3 only ones that could actually change the system in the way we
4 have asked. That narrative appears only in this courtroom and
5 not what is told to the counties day in and day out.

6 Mr. Sterling put it quite well: Generally speaking,
7 if the Secretary of State's office says to do something, the
8 counties generally do it. Because they don't want to go before
9 the State Election Board for having done something wrong.

10 These defendants control the election. The relief is
11 directly traceable to them. There is additional evidence here,
12 Your Honor, I'm not going to walk through.

13 They try to argue multiple actors defeat
14 traceability. Your Honor has dealt with this before. The
15 facts have not changed from what you addressed in summary
16 judgment. The Eleventh Circuit has been unequivocal on this.
17 Whether they are pointing to the Coffee County actors, whether
18 they are pointing to the counties that are acting at the
19 State's direction, it is clear that it is traceable to them.
20 The Eleventh Circuit cannot be clearer.

21 All right. Let me jump into the merits, which again
22 does overlap with the injury component of standing. What the
23 Court now has to do is weigh the character and magnitude of the
24 burden against the State interest. I'm going to focus on the
25 burden, and Mr. McGuire is going to focus on the State interest

1 and some other considerations.

2 Your Honor is familiar with the law. I'm not going
3 to spend time walking through this other than to say the
4 Supreme Court I think most recently in the *Crawford* case has
5 been explicit. This is a very flexible standard. And the
6 Court has broad discretion in how to address this on the facts.

7 Now, their defense is to say we have secured the
8 election. Trust us. We know what we're doing. And it is all
9 a policy decision.

10 Well, the first point I would make, Your Honor, is
11 throughout the history of our great nation there have been lots
12 of policy decisions states have made that the Article III
13 courts have stepped in and said stop it.

14 School segregation in *Brown*. Jim Crow. Interracial
15 marriage. Voting cases. Lots of voting cases. A policy is
16 not a defense, even if it is the legislature. A lot of what I
17 have just talked about was at the level of the legislature.

18 The fact that a state makes a decision, whether
19 legislatively or executive branch, a policy has never been a
20 legal defense to a constitutional deprivation.

21 But they say we understand election security so there
22 is no burden here because we have taken all the necessary
23 measures to protect against what we have alleged.

24 Well, this is what they have identified, and it is
25 fatal. Mr. Sterling says this is how his office defines

1 election security, physical security, chain of custody, and
2 cybersecurity. And let's walk through each of those.

3 We'll start with cybersecurity. You saw in this
4 courtroom, Your Honor, that Dr. Halderman was able to get
5 superuser access within five seconds on this machine, which
6 enabled him to do whatever he wanted, edit the log files,
7 change the configurations, all by taking a pen and sticking it
8 in a hole in the back of the machine.

9 And if we're in a voting booth, there is a screen
10 here. No one can see whether my hand is here or whether my
11 hand is here, unless you are directly behind me, which by law
12 is not allowed.

13 And as Joseph Kirk said, in his own precinct, often
14 these are set up, as we saw a photo, with a wall behind them.
15 So no one can see what is happening with a simple sleight of
16 hand from here versus here. And then all of the changes are
17 made on the touch screen, which anybody watching would think
18 you are simply making your selections.

19 And Dr. Halderman testified that very briefly he was
20 able to train Jeffrey Schoenberg to do exactly that. We tried
21 to do a demonstration in the court. The State objected. But
22 it is in the record that Jeffrey Schoenberg was able to do it.
23 And he actually was faster at hacking the machine than he was
24 at voting on it because of the cumbersome of actually putting
25 in the selections. That's unrefuted.

1 You saw the video of the Bash Bunny. This port right
2 here, Your Honor, this is how it is set up. There is no seal.
3 This is how it is set up in an actual courtroom. You unplug
4 that. You plug in the Bash Bunny device. It all happens by
5 itself, as you saw. These are simple fixes.

6 Why not just plug the hole if you are going to insist
7 on using it? How hard is that? Why not just seal this so that
8 it can't be unplugged? How hard is that? But this is the
9 intransigence of the State is to say we won't even meet you not
10 even in the middle, one percent of the way. Fix something.
11 But they won't.

12 These are the voter cards. We have already talked
13 about the voter card going from the internet-connected Poll
14 Pads through a cellular connection. The technician card, which
15 gives you unfettered, unmitigated superuser access --
16 Dr. Halderman created that from entirely public information.
17 Did not need the software. Did not need access to anything
18 proprietary.

19 Dr. Halderman's findings are unrefuted. As much as
20 they like to tell the public it is a load of crap, disregard
21 it, no one respects him, we all know that is not the reality.

22 Dr. Juan Gilbert said he is the guy that we go to in
23 our industry to do exactly what he did here and CISA validated
24 every single finding.

25 And interestingly enough, when the Secretary of

1 State's office called it a load of crap, no one in the office
2 had ever even read the report, including Mr. Sterling who
3 certainly led folks to believe he had read it when he called it
4 a load of crap. Unrefuted. Well, beyond what we saw in the
5 GEMS phase of this case.

6 They also dispute they claim publicly, the Secretary
7 himself, that you have to access every BMD device directly.
8 CISA says no, that there are multiple exploits where the
9 attacker can leverage the vulnerability to install malicious
10 code which could also be spread to other vulnerable ICX
11 devices. One of them is the removal of media: Just like the
12 voter cards we just talked about that are plugged in and out of
13 the machine; just like a USB that can be attached to the
14 printer; or just like the USB sticks that we have heard from
15 the State's own witnesses that they use to load the ballot
16 definition files onto the BMDs, which Mr. Barnes testified he
17 plugs in to an internet-connected computer.

18 He has two computers. One he says is air-gapped.
19 One is internet connected. But he plugs the same USB drive
20 into both. And then those files ultimately are put onto the
21 BMD.

22 The second to spread across the system --

23 THE COURT: This is for purposes of confusion and the
24 public, when you are talking about Mr. Barnes, because there
25 are two Mr. Barnes, would you just clarify that you're talking

1 about the Mr. Barnes who is head of the -- deputy head of
2 elections?

3 MR. CROSS: Right. Michael Barnes, the head of CES.
4 Not James Barnes.

5 The other is through the EMS. With the EMS, that is
6 where the data comes. Goes on to all of the equipment that is
7 used across the counties. At the state level, across the
8 State. CISA confirmed what the State has always denied.

9 And importantly what did the Coffee County folks, the
10 insiders and the outsiders get access to? Not just the
11 individual machines. They sat in the room with the EMS server.
12 Direct access. That was three years ago. Who knows what they
13 have designed in those three years?

14 Now, their only response to Dr. Halderman, other than
15 trying to discredit him, is to say, well, you haven't given us
16 a precise quantification. They want a number. And you heard
17 from every cybersecurity expert that that is not how we do it.

18 But more importantly, Your Honor, as he said when you
19 can hack a voting machine, when you can get superuser access
20 with a ballpoint pen in under five seconds, it doesn't matter
21 what standard we're using. We're not in the universe of a
22 secure system.

23 Then they tried to say with Dr. Adida, and
24 particularly with Dr. Gilbert, well, it should be software
25 independence. Okay. We can work with that as a standard.

1 Dr. Wenke Lee actually warned them as far back as 2018, as the
2 only SAFE Commission cybersecurity expert, who was selected by
3 Brian Kemp, now the Governor, that it should be software
4 independent.

5 And Dr. Gilbert talked about this. Software
6 independence means that an undetectable change in the software
7 cannot cause an undetectable change in the outcome. What does
8 that mean in simple terms?

9 It means that if the BMD glitches or is hacked in
10 some way that no one detects, you can still trust the outcome
11 of the -- of what comes out on the ballot because the ballot
12 does not depend on the BMD operating accurately. We're agreed.
13 Simple standard.

14 But here is the problem. He acknowledges for
15 software independence every ballot has to be verified by the
16 voter. Because without voter verification, you lose software
17 independence. It is undisputed from their own study. This is
18 Dr. Adida saying the same. His whole role was to say we have
19 RLAs.

20 First of all, as he acknowledged, RLAs only go to
21 election outcomes. They don't tell us anything about whether
22 an individual ballot is accurate. So they really don't have a
23 lot of relevance in this case, for the burden we're talking
24 about.

25 But he acknowledges for an RLA to be usable, to have

1 any value, paper ballots -- it has to operate on paper ballots
2 that have been verified by the voter so that they are properly
3 counted as the voter saw them.

4 So everyone agrees, Your Honor, that even for their
5 standard, going back to this, of software independence, the
6 voter has to verify their own study that they commissioned
7 showed that very few voters actually verify their ballot. And
8 we'll look at that in a moment.

9 But again, as we have talked about, it is not just do
10 they but can they. Aileen Nakamura talked about how you can't
11 possibly memorize the content of these ballots that span
12 multiple pages -- and we saw one just a moment ago -- and then
13 be expected to realize whether something is missing, whether
14 something has changed.

15 Dr. Philip Stark talked about the studies, the
16 unrefuted literature on this, including the Georgia study which
17 was in Georgia elections with this system and so did Dr. Appel.

18 Just very briefly on this, Your Honor, more than
19 80 percent checked their ballots for less than five seconds.
20 So even you can see here, over half of them either did not
21 check at all or a brief glance was less than a second. So over
22 half of them looked at it for less than a second. The maximum
23 time they were allowed to study was five seconds, which is not
24 meaningful at all. And one could infer that what this was
25 really designed to do was to generate probably a number, an

1 outcome, that the State could say, look, it shows that they
2 verify their ballots because by setting it at five seconds they
3 probably thought they would get good results.

4 That is how bad this is. Because it is so difficult
5 for voters to do. So even at five seconds, the numbers are
6 abysmal.

7 Dr. Gilbert alone, whose profession is dealing with
8 ballots, the human interface, the simplicity of it, someone who
9 probably should be the best at this in the world, it took him
10 nearly 20 seconds, not to verify anything, but just to identify
11 six selections on the ballot that were not Republican
12 candidates. Just to find them.

13 And if we were to count down five seconds right now,
14 Your Honor, someone could do the count for President of the
15 United States, vote for one, for Donald Trump; for United
16 States Senate, vote for one, for David Perdue; for United
17 States Senate, Loeffler, vote for Kelly Loeffler; public
18 commission, Jason Shaw. Pretty sure we're above five seconds.
19 We're not even a quarter of the way through the ballot.

20 Voter verification is critical for this system, even
21 by their own standard. And it is impossible to do.

22 And that is exactly what Gabriel Sterling said. If
23 you have bad human beings who make decisions that are obviously
24 against the law, that is the same for every system, the threat
25 remains the same.

1 Question: Which is why it is so critically important
2 to have ballots that are verified by the voter?

3 That is one of the reasons, yes.

4 They acknowledge that that is necessary, and their
5 own evidence shows it cannot be done and it isn't done, meaning
6 they don't meet their own cybersecurity standard.

7 So then we get to, well, who is actually responsible
8 for cybersecurity? Mr. Sterling said it is one of the critical
9 components of securing the system. But first Mr. Barnes says
10 it is not him. He has no responsibility at all, which is quite
11 odd, since he is the guy that is responsible for the machines
12 and the administration of the system. But it is not him. He
13 says that is somebody else. Somebody else determines that.

14 And he says, well, maybe it is the Secretary of
15 State's IT division, which would be Merritt Beaver as the CIO.
16 Mr. Beaver said it is not him. They have outsourced it
17 entirely to Dominion was his testimony. He says he would not
18 have even been involved in the security of the Dominion system.
19 So Mr. Barnes was wrong about that.

20 Mr. Hamilton also said, as the CISO, that has been --
21 is handed to the vendor, Dominion. But he doesn't really know
22 because he said the security of the voting equipment is not
23 even in his scope of work. So he is basically guessing.

24 Mr. Sterling also said it is Dominion but he also
25 said it is the county, suggesting the State itself has no

1 responsibility for this.

2 But Blake Evans, who is the State election director,
3 says, no, it is not really Dominion. Because when Dominion
4 recommends that we do things and we disagree, we just make our
5 own decision.

6 And you'll recall there was a specific thing that
7 they are doing they were told not to do in an actual election.
8 They do it anyways. And Blake Evans says for our state, we
9 make our own decision.

10 Well, who is making that decision? Is it Dominion?
11 Is it Barnes? Is it Beaver? Is it Sterling?

12 And that's the problem. They have not identified one
13 person in the Secretary's office with any cybersecurity
14 training, any computer science background who is involved in
15 any decision on how this system gets used, whether it is
16 secure. And yet, they are disregarding the advice of the folks
17 they say they are trusting, like Dominion and others.

18 James Barnes also says contrary to what Gabe Sterling
19 said, Merritt Beaver, Mr. Hamilton, it is not Dominion. We as
20 the counties don't rely on Dominion. We go to CES.

21 Now we're back to Michael Barnes. Michael Barnes
22 says it is not him. So where do we end up, Your Honor? Nobody
23 knows.

24 I would say I paused at putting it in there because I
25 don't want to trivialize this. But this is the level of

1 absurdity we're at, just finger-pointing and no one coming into
2 this court.

3 And it is one of the most important and devastating
4 deficiencies in their defense. They told this Court in the
5 Eleventh Circuit no one needed to hear from the Secretary. And
6 that is fine. That is their choice to make. He was not
7 required to show. And he made a choice not to show.

8 But what we're left with is not one witness who took
9 the stand and said, Judge, let me walk you through the decision
10 we made as the Secretary of State when we adopted this system,
11 when we vetted it, with cybersecurity professionals. Because
12 we acknowledge, as Mr. Sterling said, that is a critical
13 component. Let me walk you through all the decisions we have
14 made along the way on why the system is secure, on why we don't
15 need to do the CISA mitigations, on why we don't need to worry
16 about Dr. Halderman's findings.

17 Let me give you assurance on this. Not one person
18 identified any decision made on this at any point, much less an
19 informed decision at the level they are required to establish
20 to show that what they are doing is necessary.

21 And that is the standard, Your Honor, properly
22 articulates in your summary judgment decision citing -- I
23 should remember the case, but I'm bad with case names. But
24 we'll get there.

25 It has to be necessary. The burden they are imposing

1 has to be necessary. They haven't shown that it is even
2 sensible, that it complies with even the basic cybersecurity
3 standards or election security standards, as they identify that
4 term, much less that it is necessary.

5 And this shows you how reckless they are and
6 indifferent they are towards election security. Governor Kemp
7 to his credit on January 26, 2022 -- the State, through their
8 own insistence of keeping Dr. Halderman's report sealed, had
9 kept it from the public for so long. Governor Kemp says
10 January 26 that the Secretary should immediately gather all
11 relevant information -- and this is important -- thoroughly vet
12 its findings. Thoroughly vet its findings.

13 How did the Secretary respond? The next day while we
14 were in the middle of a conference with Your Honor, as I
15 recall, he called on Dr. Halderman to ask Your Honor to
16 publicly release it, which is misleading, by the way, because
17 as Your Honor knows, Dr. Halderman had been calling for that,
18 in fairness, for a long time.

19 But the very next day, he asked for it to be
20 released. What do we know? That as of January 27, the only
21 person who could have advised the Secretary on that critical
22 decision was Ryan Germany, the lawyer, with no computer science
23 background, because he was the only person who had read the
24 complete report.

25 And the best defense he could come up with is to say,

1 well, there are other people who read media accounts. But that
2 was the whole point. The report was sealed. No one in the
3 media knew what the substance of it was. Certainly not anyone
4 who could thoroughly vet it, as the Governor of the State told
5 him he needed to do.

6 Why did he do it? Politics. We heard that. Gabe
7 Sterling said they just got tired of it being discussed in the
8 media. Put it out there. Put it out there.

9 And if they had bothered to at least talk to Merritt
10 Beaver, the CIO, he would have said to him in his view that is
11 showing an ignorance of cybersecurity. Something as sensitive
12 as the Halderman report, which identifies numerous
13 vulnerabilities, you don't just release that to the public.
14 That is a bad practice. It is ignorant of cybersecurity.

15 Now, he is wrong. The right way to do this is to
16 have a reasonable measure of transparency and in particular to
17 get it to CISA, which is what we were always trying to do. And
18 they objected.

19 So then we are left with, Your Honor, who is advising
20 the State? Who is making these decisions?

21 It is not Dr. Wenke Lee, who warned them not to do
22 what they were doing. Vehemently objected to it in 2018.

23 It is not Michael Shamos, who said don't do QR codes
24 in 2019. It is not Theresa Payton, who has provided report
25 after report after report of massive security failures within

1 the Secretary's office, which remain unmitigated. We don't
2 know the full extent of them today because after Your Honor
3 relied on them, the reports in 2019, Mr. Beaver told her, stop
4 putting those in writing.

5 It is not Jack Cobb. As we learned in 2020, he
6 doesn't understand the basics of security. He thought that
7 hash tests -- hash testing was a way to secure the system
8 against malware. Unrefuted that it is not.

9 But more importantly, all of these people have tried
10 to help them at least in some measure. And every single one
11 has disappeared from this case. Every person who tells them
12 what they don't want to hear and has the expertise to advise
13 them, they just send out to the pasture never to be seen again.

14 And so who is making the decision? At the top, we
15 have a long list of individuals who have at least some modicum
16 of computer science background, many of whom are leading
17 election cybersecurity experts. They like to say they like to
18 attack Dr. Alex Halderman because his name is the author of the
19 report. But contrary to what they have the public believe, he
20 is far from alone.

21 Here you have a long list of leading election
22 security experts acknowledged by Dr. Gilbert. You also again
23 have their own experts. Dr. Ben Adida says don't do it this
24 way. 99.9 percent of the time, hand-marked paper ballots with
25 one BMD for accessibility.

1 Dr. Juan Gilbert said don't do QR codes. He doesn't
2 refute any of the findings here and agrees that they need to be
3 mitigated.

4 David Hamilton had his own recommendations, get a
5 full-time CISO. He also recommended having a policy that would
6 make sure that USB removable media was secure. That policy was
7 never adopted.

8 Merritt Beaver said don't let the software get out to
9 the public. That is a roadmap to hack elections.

10 CISA. Dominion's recommendations. Disregarding
11 everything that anyone with any level of competency tells them.

12 And who are we left with? Maybe Secretary
13 Raffensperger. We don't know if he is involved in any decision
14 at all.

15 But everyone at the bottom. Not one of them has an
16 iota of computer science training, much less cybersecurity.
17 The people making the decision on election security in the
18 State in the face of unrefuted findings on how dangerous this
19 system is. Making their own decisions, as Blake Evans told
20 you, whatever those are, whenever they are made, have no idea
21 on what they are doing. Because they are just not qualified.

22 And like we saw in the release of the Halderman
23 report, it is all driven by politics. The right to vote should
24 never be driven by politics. So that is cybersecurity.

25 And I will quickly touch on the other points that

1 Mr. Sterling said they rely on for election security. He says
2 chain of custody. Well, we know that they just started doing
3 chain of custody forms. And so that means for years in this
4 system, the BMDs, the printers, the EMS servers have been
5 moving around the State among counties without any chain of
6 custody paperwork, including when they were replaced, one that
7 James Barnes thought was potentially compromised in May of
8 2021. James Barnes also acknowledged no paperwork. They just
9 came in and took it.

10 What else did we learn? That when there is an issue
11 that is raised with an EMS server, they just throw one on a
12 truck and drive around the State to wherever they are going.
13 Just bouncing around in the back.

14 That is not any level of chain of custody that anyone
15 would ever think is sensible. And it is certainly not secure.
16 Still, Your Honor, they are the ones that tell the States what
17 they are supposed to do.

18 THE COURT: Counties.

19 MR. CROSS: I'm sorry. Thank you.

20 The State is the one that tells the counties how to
21 run elections.

22 This gets to training. The other point that
23 Mr. Sterling made is training is really important. We're good
24 on it.

25 So again, they acknowledge they are doing the

1 training on traceability and redressability. But there's many
2 examples of county officials telling them time and time again
3 that they are not complying with what they are supposed to do.
4 And these are the folks they say they rely on to run the
5 elections.

6 Interestingly, they object to all of this as hearsay.
7 So, you know, we don't know whether this truly happened. But
8 it is odd that they are telling you that the very people they
9 trust to run the elections, that when they provide reports of
10 security problems, those reports are so unreliable that the
11 Court has to treat them as untrustworthy.

12 But here you have just in a single instance in an
13 election, Your Honor, broken seals, missing zip ties, open
14 databases. One of the machines had a ballot cast on it. We
15 never heard how that happened.

16 And when they come in and say, hey, even during logic
17 and accuracy testing, we discovered missing seals -- so they
18 are getting ready for an election or perhaps after an election,
19 before the machines are going to be used again -- even the
20 State doesn't follow its own training.

21 Mr. Barnes, Michael Barnes, said just throw another
22 seal on there and keep using it. No concern about why that
23 seal is missing or broken. The whole purpose of that seal is
24 to ensure that it hasn't been tampered with. Just throw one on
25 and keep using it. They said we just assume that it was a

1 mistake by the county. You can't assume that in this
2 environment, particularly after Coffee County.

3 The last point Mr. Sterling said was physical
4 security. Well, Cathy Latham and Misty Hampton and the others
5 literally opened the door to Georgia's voting system. And not
6 just in Coffee County. These people sat down at the EMS
7 server, Your Honor, and hacked access to all of the equipment
8 there. I won't walk through that. You are intimately
9 familiar.

10 Now they try to minimize. They say it is not even
11 relevant, which is how little they -- regard they have for
12 election security to say that that is not even relevant to
13 whether the system is secure. That is not again what they say
14 in the ordinary course.

15 In December 2022, when there was a concern about a
16 similar request, a forensic analyst coming in, inspecting all
17 the election equipment in Butts County, this is what the
18 general counsel said at the time. It would be a huge security
19 breach to allow that to happen.

20 So while they tell you in court, Coffee County is not
21 a big deal, in the ordinary course when they were worried about
22 what was happening, they acknowledged that it would be a huge
23 security breach. And importantly, Your Honor, we have not
24 heard of anything the State has done since.

25 That poll manual they put into evidence, no changes

1 in response to Coffee County. No new training. No new
2 materials to emphasize the importance of seals securing the
3 system. Nothing new going to the counties we have heard about
4 at all coming out of this. Their response is to say let's just
5 pretend like it didn't happen.

6 And here you can see access to the EMS sever, the
7 SullivanStrickler on the left, and literally cutting the seals
8 on the Poll Pads on the right. Again, those are the Poll Pads
9 that are connected to the internet that the voter cards move
10 from to every BMD in the State every time there is a vote.

11 So just really quickly. So we understand the degree of
12 what happened. This is a list of the files that
13 SullivanStrickler grabbed. Six different categories from
14 virtually every piece of equipment, down to the level of the
15 BMD operating software.

16 What did they do? Well, they went back. They put it on
17 their computer. Then they sent it out into the internet on a
18 ShareFile. That ShareFile then transferred those files to
19 Cyber Ninjas.

20 What did Cyber Ninjas do? Doug Logan. He created what is
21 called a virtual machine. That virtual machine lets anyone who
22 has access to it to basically pretend like they have a full BMD
23 system with all the software, everything they need, and they
24 can tinker with it. And what did Mr. Beaver tell you? That is
25 the roadmap to hack elections.

1 Then he loaded it back up to the ShareFile. So that
2 virtual machine sat there for anyone who could get access. And
3 what do we know about access? Well, not a lot, because we have
4 limited information. But we do know that there are IP
5 addresses all over the world on the upload and download access,
6 including Stefanie Lambert, who is under investigation in
7 Michigan; including Ben Cotton, who got it from Stefanie
8 Lambert in Montana.

9 It is literally out in the wild and has been for years.
10 Mr. Skoglund said this is uncontrolled distribution and it is
11 incredibly dangerous.

12 What did the State do? Ignored it. Obscured it. And now
13 they minimize it. If they had done even a modicum of an
14 investigation, Your Honor, just based on what they knew at the
15 time -- and I'm not going to walk through each of these. Just
16 highlighting some of the facts. Not all of them.

17 Some of the facts that were known -- sorry -- I really
18 jumped ahead.

19 If they literally just paid attention to what they knew at
20 the time, even did a simple Google search on things like Cyber
21 Ninjas, they would have put the pieces together. And this is
22 what they would have found.

23 They had all the information they needed in May of 2021, a
24 long list of facts. And the only thing they did was have
25 Mr. Blanchard call James Barnes, he says. But James Barnes

1 testifies there was no such call. That after his email to
2 Chris Harvey, he never heard back from the State.

3 Even if we give them the credit of Mr. Blanchard, at most,
4 it was a 15-minute phone call in a span of a couple of hours.
5 As Michael Barnes said, while he was tasked with assessing the
6 unauthorized access of the machine, which Ms. Watson testified
7 to, Mr. Barnes said he didn't do it. The most he did was try
8 to access the password, and then he just threw it in a closet
9 and walked away.

10 That is the level at which they handled physical security,
11 which Gabe Sterling told you is a critical component of how you
12 secure the system.

13 Now, interestingly enough, in their defense, I think they
14 spent maybe the most time or certainly about the most time of
15 any witness they put on the stand was Marilyn Marks. Not their
16 own people to come in and defend their decisions. Marilyn
17 Marks.

18 And it was almost entirely about a call from Mr. Scott
19 Hall in the spring of 2021. They said if we had known that --
20 somehow with all these pieces of the puzzle, if we had just
21 known that one more, we would have taken that seriously. But
22 we know that is not true. Because they had that call played
23 for them in February, and here is what Gabe Sterling said
24 two months later.

25 **(Playing of the videotape.)**

1 MR. CROSS: So even with all the original puzzle
2 pieces and then the Scott Hall call, they still announced to
3 the public, we investigated, and it didn't happen. He
4 acknowledges that obviously was not accurate.

5 But they also told this Court at the time,
6 repeatedly, invoking the investigative privilege, so that we
7 could get no discovery, or very little, into what they were
8 actually doing in Coffee County. In an investigation they
9 repeatedly said, with an ongoing investigation through March,
10 May, April, June, July, all the way up until August, when it
11 was finally referred to the GBI. The person who was tasked
12 with the investigation says, I was told to hold off moving
13 forward. That came from my supervisors.

14 So is it fair to say that you were never actively
15 investigating Coffee County?

16 No, sir. I never investigated the breaches.

17 There is no evidence that anyone in the Secretary's
18 office, despite the repeated representations, ever investigated
19 this at all, even when they say they had that final critical
20 piece, the Scott Hall call.

21 So where that leaves us is, when you look at the
22 pillars of what Gabe Sterling said are necessary for election
23 security, they fail at every single one, from cybersecurity to
24 physical security to training -- all of them and chain of
25 custody. Not one did they get anywhere close to any measure of

1 success, in a system that is as vulnerable and hackable as
2 these Dominion ICXs are in this State in the way they are
3 managed.

4 Now, the other point on Coffee County is that it
5 cannot be denied that it has greatly increased the risk.
6 Mr. Kevin Skoglund addressed this. Merritt Beaver himself said
7 you don't want the software out into the wild. His view is the
8 best defense is to keep everything secret, talking specifically
9 about why you want to keep the software secret.

10 This is the attorney for the State in a hearing
11 involving Ms. Powell's attempt to get access to a particular
12 county in the November 2020 time frame. He says it quite well.

13 Security risk for Ms. Powell's minions to go in and
14 image everything, download the software and figure out for
15 future elections a way to hack, would give them the proverbial
16 keys to the software kingdom. That is the State's lawyer, the
17 Secretary's lawyer. We could not agree more.

18 And that is exactly what happened in Coffee County.
19 It was Ms. Powell's minions, as he put it. She paid for it.
20 SullivanStrickler on January 7. Exactly what he said. And the
21 important part of this is not just the keys to the software
22 kingdom. But pause on what he warned, his ominous warning to
23 figure out for future elections a way to hack in.

24 That is why the threat today is not just the foreign
25 actors where this case started years ago. It is domestic. The

1 State has long understood that what happened in Coffee County
2 with the very people that they were concerned about was a grave
3 risk for future elections because those and potentially others
4 around the world now have the keys to the kingdom, the roadmap
5 to hack future elections in a way that is incredibly simple.
6 Just get superuser access. In fact, with a ballpoint pen, you
7 don't even need what he is talking about here.

8 So their response to this, Your Honor, all of this
9 evidence is to say, it is okay. Even if it is true that it
10 could be hacked, we would detect it. A voter would detect it.
11 They would bring it to our attention.

12 On this, Your Honor, Dr. Appel did the math on this.
13 Explained the probability of a voter catching this is literally
14 less than one percent. Because if you think about, in simple
15 terms, you've got a very small percentage of voters, if you
16 take their own UGA study, who spend the time required to
17 actually verify a vote and realize that something has been
18 switched, like we did with the demonstration we started with.

19 First, you've got to have that voter catch it. But
20 then if they raise it, if the hack on the BMD changes, say,
21 every one in 20, one in 50, one in 100 ballots, which are the
22 number of voters you have in the state, and given the margin
23 of, say, the 2020 presidential election would be enough, if you
24 have that close of a margin or it could be a down-ballot, close
25 margin -- you don't need to change a lot on a percentage level.

1 What that means is if that voter then goes back to
2 vote again on the same BMD, that voter is going to get a
3 correct ballot. Because it is changing one in every 50, one in
4 every hundred. So everyone will think, oh, that voter was
5 mistaken.

6 So that ballot gets corrected. But for all of the
7 others that don't get caught, because voters don't or cannot do
8 this, it is just chalked up to a voter mistake on the very few
9 instances where someone might actually identify it.

10 And the chances, the probability, as Dr. Appel
11 explained, of any of all that happening is literally a small
12 fraction of one percent. But then they say -- then they
13 ignore, Your Honor, the detection itself might be the goal.
14 That would lead to chaos. Mr. Sterling acknowledged, sure,
15 that absolutely could be something that a bad actor wants to
16 do, to make sure it gets detected. Because that in and of
17 itself will disenfranchise voters.

18 Because if you're at a point where you have a BMD or
19 multiple BMDs that have now shown to flip votes, your entire
20 system, at least that entire precinct, is now called into
21 question. And so what better way to disenfranchise voters and
22 to throw the entire voting system into chaos than to ensure
23 that it gets caught.

24 This is where Dr. Ben Adida is really important. He
25 is right. The final safety net of a good voting system is one

1 where even if the computers were infected with malware, we
2 would have a way to detect -- that is point one -- and recover.

3 We have already shown the likelihood of detecting is
4 miniscule. But the recovery -- there is no recovery. We asked
5 about this. I asked Mr. Sterling, what would you do if it
6 turned out one or even 20 BMDs were shown to be flipping votes?
7 He had two answers on the critical required element of
8 recovery.

9 Well, first, we would just pull those BMDs out of
10 service. He obviously has never even thought through the
11 implications of that. In a polling site where you pull even
12 one BMD out of service, what do you do for that entire polling
13 site?

14 Every BMD that came off that -- every ballot that
15 came off that BMD that may now be infected -- we know some of
16 them are -- they went into the same ballot box with all the
17 others. You cannot find them. You can't discern them. So
18 every vote in that precinct is now infected. It is unreliable.

19 So even if you know the other BMDs still work, your
20 collection of ballots at that point, you can't use any of them
21 because you don't know which are right and which are wrong.

22 That means you get to the next recovery mechanism,
23 which is you rerun an election and you do it on hand-marked
24 paper ballots. You can't just throw those ballots out. You
25 disregard -- you would disenfranchise hundreds or maybe

1 thousands of votes. You also acknowledge you can't find those
2 voters. You don't know how to find the voters whose ballots
3 are even in there, if you could somehow segregate the ones that
4 are flipped.

5 So we're left with their own expert saying you've got
6 to be able to recover. There is no recovery mechanism. And
7 even if we thought that they could go to the hand-marked paper
8 ballot as a backup, both Mr. Sterling, as the most senior
9 officer from the Secretary's office, said the State is
10 unprepared for that.

11 Even though it is mandated by law, even though Your
12 Honor ordered it in 2019, they are unprepared to use
13 hand-marked paper ballots.

14 And Mr. Mashburn, the chairman of the SEB, explained
15 why. We don't have the infrastructure. We haven't done the
16 testing. We haven't put it in place. Georgia is nowhere near
17 ready for that.

18 So Dr. Adida warns them, you've got to be able to
19 recover. And their response is we can't. Your Honor ordered
20 in 2019 a real, legitimate hand-marked backup plan. They have
21 never complied with that order. The legislature said, you've
22 got to have hand-marked paper backup as a real backup. The SEB
23 has disregarded that with a 10 percent rule that is -- everyone
24 is telling you does not have them ready for where we may land.

25 I think the irreparable harm part, Your Honor, really

1 should not be in dispute. I won't spend time on this. The
2 Fourth Circuit said there can be no do-over and no redress for
3 something as fundamental as the right to vote.

4 Quickly on Northampton, Your Honor, this is real
5 world. Their response is to say everything we talk about is
6 not real world. I asked Mr. Sterling himself in that question
7 about whether they are prepared.

8 What if the BMD doesn't work right? What if you
9 can't use it? His response, that is a hypothetical. It would
10 never happen in the real world.

11 Ironically, Mr. Sterling is the first person to ever
12 mention Northampton in this trial. Both he and their experts
13 said it was the shining example of how you deal with this. It
14 is frightening. Yes, it was caught in that instance because it
15 affected every single ballot. It was not intermittent.

16 But here is the chaos of what ensued. Some shut down
17 voting entirely. Some were told to vote against their
18 preference because at the time they thought it was flipping the
19 QR code and the human readable text. So if you wanted to vote
20 for candidate X, they said vote for candidate Y. That way you
21 get the right outcome.

22 That turned out to be a disaster because it turned
23 out it was flipping only part of the ballot, they think. They
24 think the QR code maybe was right. And that was done in some
25 counties and not others. So then how do you figure out which

1 ballot did they try to flip or not? It was chaos.

2 But that was inconsequential in the end. Because, if
3 I remember right, I think it was an uncontested judicial
4 position. Imagine that that is the President of the United
5 States. And imagine that the entire country is waiting for
6 Georgia to certify as the last state that pushes one candidate
7 over the other. And there is no recovery. There is nothing
8 you can do. You couldn't even go to hand-marked paper ballots
9 because they are unprepared.

10 Just briefly on the redressability, Your Honor,
11 again, I don't think there can be any reasonable dispute about
12 this. Your Honor's 2019 decision I think puts the nail in the
13 coffin of that.

14 Secretary Raffensperger himself has acknowledged both
15 in the press and in Congress that the reason that they rolled
16 out the BMD system in the way that they did at the time they
17 did is because this Court ordered it. He told Congress it was
18 the first thing that he had to do in 2019 was to get set up for
19 this because he knew Your Honor's decision was requiring that.

20 So to now say that it is not redressable is
21 inconsistent with what the Secretary himself has said. Your
22 Honor has broad discretion on the remedies here.

23 The remedies we're seeking, Your Honor, first and
24 foremost, take your 2019 decision, swap out GEMS and DREs, and
25 it is the ICX and the printer. It is that simple.

1 I will say, Your Honor, also -- and Mr. McGuire will
2 talk about this. There are also lesser included other things
3 that the Court should do, some of which are low-hanging fruit
4 to the point Your Honor could do it quickly. Probably within
5 days, but I know you are tired. We've been dealing with a lot.

6 But here is two things the Court could do quickly.
7 One -- I mean, you have ordered it before -- but have an order
8 that has more specifics. A real hand-marked paper ballot
9 backup plan that complies with Georgia law. I want to
10 emphasize that. We're not asking you to contravene Georgia
11 law.

12 We're asking you to order them to comply with their
13 obligations on one of the most critical components the
14 legislature had the good foresight to recognize is needed to
15 protect the right to vote. A real plan so that you don't have
16 the Secretary and the SEB saying we're unprepared for when we
17 may have to go there in today's environment.

18 And that should be ordered, a plan that is detailed,
19 that is informed by the right people, and is put together
20 within weeks. That is not difficult. And they have years to
21 do it.

22 The other thing the Court can do is to enjoin them
23 from preventing the counties to exercise the own discretion
24 that the legislature vested in the counties to determine when
25 the machines are unsafe to use. That is another mechanism that

1 the legislature decided is the right way to protect the vote.

2 Ironically, they want to tell you the counties are
3 the best positioned to run the day-to-day, to manage security,
4 to understand how this works. They say it is so much on the
5 county that it is not even -- the claims and the relief are not
6 even traceable to them or redressable. Okay. Well, if that is
7 true, then get out of the way. Stop breaking Georgia law and
8 telling counties they can't do what the legislature has told
9 them they are allowed to do. That could all be done quickly.

10 Last thing, Your Honor. Then I am done. It is
11 important to note how much their defenses changed in this case.
12 Here is why it matters. Because they keep moving the goalpost
13 to make it harder for us to prevail.

14 But where they started is probably the closest
15 articulation. In 2019 when we filed this, they said we hadn't
16 shown hacking but also security vulnerabilities or other
17 problems.

18 By their own argument, that is all we had to show,
19 security vulnerabilities or other problems. Well, we showed
20 that with Dr. Halderman and other ways. They said, well, okay,
21 now you've got to show active security risk or hacking
22 potential. That was certainly Dr. Halderman.

23 Then they said, oh, gosh, well, now you've got to
24 show an actual breach of the BMD system. You'll never be able
25 to do that. Then we had Coffee County. They said, oh, gosh,

1 we've got to try again.

2 Then they say now that we have to show that our own
3 clients' ballots or maybe any other ballots cast using a BMD
4 were not accurately counted. That is not any standard that
5 exists anywhere in the law. And if that were the standard,
6 then voting would become illusory and we would be in a world
7 which is contrary to *Reynolds*, where *Reynolds* says, it also is
8 the right to have your vote counted, not simply to be cast.

9 And all we're -- it is, as Your Honor said in 2019,
10 coming out of 2018, like deja vu all over again. There is a
11 Yogi Berra quote in here that we could all probably recall. It
12 is literally deja vu all over again, all over again.

13 And so, Your Honor, the last piece on this, very
14 briefly, it has been a deliberate character assault on our
15 experts and others. And let me say why this matters. Here you
16 have Mr. Hassinger saying, if you don't like our Ph.D.s in the
17 same category as the pillow salesman, tough noogies.

18 Here is why this matters. Because Gabriel Sterling
19 has now acknowledged what we always expected. They know the
20 election denier label for our clients and our experts is not
21 true because this is his definition. An election denier is a
22 person who denies the outcome of an election based not
23 necessarily on fact but on theory and not evidence.

24 The State themselves emphasized repeatedly that our
25 clients and our experts actually don't deny the outcome of any

1 election. Our experts signed a letter with their experts on
2 2020. So they are saying something they know is not accurate.

3 And it was a communications decision. A
4 communications decision. And why, Your Honor? Because if they
5 can discredit our experts and discredit our clients, then we
6 can't even go to the legislature to get help. And that is the
7 insidiousness of this communication decision, to say that our
8 experts and our clients have so little integrity, credibility,
9 to destroy the professional reputation that they can't get help
10 anywhere outside this Court, which leaves Your Honor as the
11 last resort.

12 And the last thing I will say is, Your Honor, I could
13 not agree more with Secretary Raffensperger; that if you want
14 to know the truth, watch what happens in court. Well, the one
15 person who did not show up to watch what happens in court and
16 who matters the most was the one that makes these decisions,
17 presumably to whatever extent there was, chose not to be here.
18 And that tells you everything you need to know.

19 Thank you, Your Honor.

20 THE COURT: Thank you.

21 MR. MCGUIRE: Your Honor, I have to set my computer
22 up there. It will take me a couple of minutes.

23 THE COURT: All right. If anyone needs a bathroom
24 break.

25 I just want to say to the officer, the woman who is

1 standing there, she is welcome to come in. It is a little
2 distracting to me to have her just looking.

3 COURTROOM SECURITY OFFICER: She was coughing, Your
4 Honor.

5 THE COURT: Okay. She can -- she can come in. She
6 cannot come in.

7 COURTROOM SECURITY OFFICER: All rise. Court will be
8 in recess for about five minutes.

9 **(A brief break was taken at 12:04 PM.)**

10 THE COURT: Have a seat.

11 Go ahead.

12 CLOSING ARGUMENT

13 MR. McGUIRE: Thank you.

14 Good morning, Your Honor. My name is Robert McGuire
15 as you know. I'm here for the Coalition for Good Governance
16 and the Coalition Plaintiffs.

17 On behalf of my clients and our legal team, I would
18 like to join Mr. Cross in thanking the Court and the reporter
19 and the clerks for spending the last four weeks with us. It
20 has been great. And we are just very happy that after
21 seven years of litigating this case that we're finally
22 approaching the point at which we can hopefully get relief that
23 will serve our clients and serve the public.

24 Three and a half weeks ago when we opened, I told the
25 Court that what you were going to see over the last four weeks

1 was going to fit into four different buckets. There were
2 standing and then Anderson-Burdick has two parts, the burden
3 and the State interest, and then finally relief.

4 I think we have checked off all of those boxes over
5 the last four weeks. And I would just like to briefly
6 highlight how we've done so and explain why we have given the
7 Court what it needs to be able to rule for the plaintiffs and
8 give us the relief we're requesting.

9 First of all on standing, standing is essentially, it
10 seems to us, essentially uncontested throughout this actual
11 trial. As Mr. Cross indicated, there are three elements of
12 standing: Injury-in-fact, causation by the conduct being
13 challenged, and redressability by an order from the Court.

14 And there are two different kinds of plaintiffs.
15 There are individual plaintiffs, and there is an organizational
16 plaintiff. And there is a one-plaintiff rule which applies
17 here because all of the plaintiffs are seeking the same relief
18 under the same essential causes of action.

19 My chief client, the organization, Coalition for Good
20 Governance, has to prove an injury in the nature of a diversion
21 of resources from something to something else, which it has
22 undertaken as part of challenging the conduct at issue in the
23 case, which is the requirement for voters in person to use
24 these devices.

25 You heard from Rhonda Martin in testimony that is

1 essentially been uncontradicted that Coalition for Good
2 Governance has diverted both time and money to opposing the
3 requirement that in-person voters have to use ballot-marking
4 devices when they vote.

5 The State didn't put on any evidence to contradict
6 that. It is undisputed. And that alone is enough to give
7 Coalition for Good Governance standing.

8 The law on diversion is very clear, that an
9 organization can divert resources from one priority to another
10 priority. It doesn't have to be to something that is outside
11 of its priorities or to something that it wasn't already hoping
12 to do. But if the conduct that is being challenged, if
13 challenging that conduct requires readjusting the priorities of
14 the organization, that is a diversion. And that is essentially
15 uncontested.

16 As far as the individual plaintiffs go, and not just
17 the individual plaintiffs, but also members of the organization
18 who lend their ability to sue to the organization through
19 associational standing, we've shown injuries that give standing
20 for those individuals as well.

21 An injury-in-fact is sufficient for standing purposes
22 if there is an invasion of a legally-protected interest which
23 is concrete and particularized and actual or imminent, as
24 opposed to conjecture or hypothetical. The thing that we're
25 claiming is a burden on our constitutional rights can be an

1 injury. But things that are not illegal can also be injuries.
2 And in this case, there are a host of injuries that you have
3 heard about.

4 You've heard about the deprivation of secrecy that
5 in-person voters suffer when they have to vote on these
6 machines. You heard from Aileen Nakamura, Megan Missett, Laura
7 Digges, the other plaintiffs including the Curling plaintiffs.

8 You've heard from all the individuals that they can't
9 read the QR code on their ballot, which is the official vote
10 that is going to get tallied when they run it into the
11 tabulator. That is an informational injury to all of those
12 people, all of whom who have cognizable interest in knowing
13 what votes they are actually casting.

14 And finally, there are more. But the ones I want to
15 focus on, the burden that Mr. Cross touched on, which is the
16 burden of reviewing the BMD-printed ballot. That is an actual
17 injury-in-fact because the law of injury-in-fact covers lots of
18 things.

19 Standing law is famous for saying that all you need
20 to be able to invoke the jurisdiction of a court is an
21 identifiable trifle. A postage stamp. A poll tax of a
22 dollar-something. You just have to personally have some kind
23 of concrete thing that has affected you for you to be able to
24 come to court and invoke the jurisdiction of the court.

25 THE COURT: I don't think it gets to be just a

1 trifle. But go ahead.

2 MR. MCGUIRE: Well, in the *SCRAP* case, the Supreme
3 Court calculated it --

4 THE COURT: Okay. Let's proceed. I didn't mean
5 to --

6 MR. MCGUIRE: Fair enough.

7 These burdens are injuries-in-fact.

8 And the last one I spoke about, I'm actually going to
9 talk more about, because it is not just an injury for standing.
10 But having to review the BMD ballot is actually -- that is a
11 severe burden on the right to vote under *Anderson-Burdick*. I'm
12 going to explain why that is true.

13 But just to close the loop, that injury, that burden
14 of having to review the BMD printout, that is an injury that
15 you heard testimony from Jeanne Dufort about, from Megan
16 Missett, from Aileen Nakamura. You heard about it in the more
17 abstract from the experts who talked about how poorly voters
18 are able to do that.

19 It is a cognitive challenge to voters to have to
20 review a long ballot that has lots of information. And to have
21 to do it as a requirement of being able to cast their vote is
22 certainly an invasion of a legally protected interest, of a
23 legally cognizable interest. So they have standing.

24 The other two elements of standing are causation and
25 redressability. Causation is satisfied if the injuries I just

1 talked about are traceable to the conduct being challenged,
2 which here is the requirement that these individuals have to
3 use this machinery. We're challenging that. That is causing
4 the injury. That satisfies causation and traceability.

5 And finally for redressability, the Court, if it were
6 to issue an order preventing the State from requiring in-person
7 voters to use these machines to vote in person, that will
8 redress the injuries. And that means we have standing.

9 As far as the organizational standing goes, I would
10 also just add it is law of the case in this case that the
11 Coalition for Good Governance has organizational standing in
12 the most recent appeal. The Court of Appeals in the Eleventh
13 Circuit held that because the Coalition had credibly made the
14 assertion that the State's policy would force them to divert
15 personnel and time to educating volunteers and voters and to
16 resolving problems that the policy presents. Because we had
17 credibly made that assertion, we had standing to bring a
18 request for injunctive relief.

19 Not only have we made the assertion, but at this
20 stage of the litigation, as our evidentiary burden has gone up,
21 we have presented actual evidence that substantiates that those
22 allegations and those assertions are validated.

23 So law of the case controls here. And because of the
24 one-plaintiff rule, if Coalition for Good Governance has
25 standing, so too do the remaining plaintiffs.

1 The second bucket which I had mentioned in the
2 opening was the bucket of Anderson-Burdick. And
3 Anderson-Burdick is the governing constitutional test which
4 will help you decide on the merits, now that we're in court
5 because we have standing. We have to prove that burden on our
6 rights, the burden. Specifically I'll just quote from the case
7 law --

8 THE COURT: All right. I hate to interrupt. But
9 only because we've gone through this with your co-counsel and I
10 want to make sure you-all have enough time -- I know how able
11 the defense counsel are too -- I think you should go ahead and
12 skip on.

13 MR. McGUIRE: I'm perfectly happy to do that. In
14 fact, in that case, what I will do, I will just go over -- I'll
15 skip over a lot of stuff.

16 If Your Honor has questions for me, I would be happy
17 to address it.

18 THE COURT: That's fine. It is just anything that is
19 going to be duplicative, I think you should save the time.

20 MR. McGUIRE: The one thing I will note on the
21 Anderson-Burdick standard, which I think should be borne in
22 mind here, is the Eleventh Circuit has held that when you look
23 at -- when you weigh the burden imposed on voting against the
24 State's legitimate interests for imposing that burden, in the
25 *Democratic Executive Committee of Florida v. Lee* case in

1 2019 -- it is 915 F.3d 1312 -- that court held that we must
2 take into consideration not only the legitimacy and strength of
3 the state's asserted interests, but also the extent to which
4 those interests make it necessary to burden voting rights.

5 So it is not just enough that the State has an
6 interest that sounds like a good interest. That interest has
7 to be necessary. It has to be necessary to burden voting
8 rights in order to serve that interest.

9 And I think you'll find as we get through this that
10 there is nothing about the State's burden here, the
11 State's interest here that makes it necessary to force voters
12 to use this machinery to vote in person.

13 Once we're in the realm of the merits under
14 Anderson-Burdick, the world of burden gets bigger. When you
15 are talking about a standing injury, you have to talk about
16 particularized injury that is experienced by the voter.

17 But once you move into the realm of Anderson-Burdick,
18 you are able to look more broadly as what the generalized
19 burden on voting and on voters is. And that also is from that
20 *Democratic Executive Committee of Florida v. Lee* case.

21 They talk about -- they actually talked about the
22 burden in that case as being generalized burden on the
23 fundamental right to vote; like a poll tax, which is universal;
24 like a literacy test, which is universal. A universal
25 requirement that applies to all in-person voters can impose a

1 burden, and that universal generalized burden can be deemed to
2 outweigh any interest of the State.

3 So in this case, the burden I want to focus on right
4 now, because I think it ties together much of what Mr. Cross
5 presented and I think it gives the Court what it needs to rule
6 for us under Anderson-Burdick, is this burden of placing on
7 voters of accurately verifying the paper ballot that gets
8 printed out from the printer that is attached to the ICX BMD.

9 As Mr. Cross pointed out, there are two reviews that
10 a voter has to go through when they are casting a vote on a
11 BMD.

12 The first one, they touch their selections on the
13 screen. Then they review all their selections on the screen.
14 That first review is presumably to make sure that they tap the
15 right spots and they got the right votes recorded.

16 But then they print that ballot, and they are
17 supposed to review it again. And it is not just a prudential
18 requirement. There is actually an SEB rule, which is
19 Rule 183-1-12-.11(2)(b). That rule says, upon making his or
20 her selections, the voter shall cause the paper ballot to
21 print, remove his or her paper ballot from the printer, remove
22 the voter access card from the touch screen component, and then
23 importantly review the selections on his or her printed ballot.
24 And then they go and scan them.

25 Now, that second review is not a review necessarily

1 to review your own choices, because you just did that
2 on-screen. What you are doing in that second review is you are
3 reviewing the functioning of that machine. You are reviewing
4 the proper functioning of the ballot-marking device connected
5 to the printer, to make sure that what it prints is what you
6 have already reviewed.

7 And that is important because what you're asking the
8 voter to do there is verify the security of the voting system.
9 You're asking each individual voter to bear the responsibility
10 of checking whether their machine is functioning properly.

11 That is a burden separate and apart from the burdens
12 that are ordinarily incidental to voting. And because of all
13 of the things that Mr. Cross has identified about how insecure
14 the system is and how vulnerable the system is and how
15 important voter verification is for all of the safeguards that
16 the State relies upon to ensure that the system is functioning
17 properly, hasn't been hacked, isn't in the process of having
18 malfunctions, all of that -- all of that responsibility is
19 placed on the shoulders of every individual voter.

20 And it has to be every individual voter, rather than
21 voters collectively, because the numbers that Professor Appel
22 and Professor Stark gave the Court show that very few ballots
23 have to be hacked. A hack could affect one in 100, one in a
24 1,000. So you need every voter to be checking. And so that
25 burden falls on everyone.

1 And it might be something that the voter has
2 absolutely no interest in. So if I'm a voter and I choose to
3 undervote because I don't like the guys that are running for
4 whatever race I don't want to vote on -- and Mr. Sterling
5 admitted on the stand, that is fine. Maybe it was Sterling.
6 Maybe it was Mr. Mashburn. But one of them admitted on the
7 stand it is fine for people to undervote; they are allowed to
8 do that.

9 But if I'm undervoting, I still have the legal
10 obligation that the State is foisting on me to make sure that
11 what is on that ballot in the race I had no interest in doesn't
12 contain a vote that has been added or that election contest has
13 been dropped.

14 And so it is a burden completely unrelated to my own
15 personal interest in voting, and it is a substantial burden, if
16 it is not a severe burden. We believe it is severe. But it is
17 certainly a weighty burden. And the thing that makes it
18 weighty is the consequences of me not doing it.

19 So you heard from the State's experts that catching
20 malfunctions requires voters to do this review. The
21 effectiveness of audits requires voters to do this review. You
22 heard that from Joseph Kirk, who is one of the best county
23 superintendents in the State. He is very careful to make sure
24 his workers remind everyone to check their ballots because he
25 emphasized how important it is for everyone to do it.

1 You heard from Dr. Adida about how important it is
2 for people to do it. Now, Dr. Adida had a relaxed view of how
3 many people have to check. He thought 50 percent was fine.
4 But even 50 percent is a lot of voters, and they all have to
5 bear that burden.

6 You heard from Dr. Stark that everyone has to check
7 or else you can't trust the paper. And that's what makes more
8 sense because, given that a hack may show up very subtly, you
9 need everyone to check or else you are not serving the function
10 of checking at all.

11 Dr. Adida emphasized and he was joined by Joseph Kirk
12 that the confidence of the public in the integrity of their
13 elections depends on voters checking. In fact, the whole
14 integrity of the voting system requires it. And the reason the
15 whole integrity of the voting system requires it is because of
16 all the things that Mr. Cross pointed out earlier.

17 The State has ignored the Court's earlier logic and
18 accuracy ruling. Ignored it. They aren't testing the machines
19 before they are run. And why? Because the voters are the
20 test. The voters are the ones checking.

21 The State has ignored the auditing ruling by the
22 Court. It has ignored the new auditing law actually. And that
23 is a reflection of the degree to which they are relying upon
24 the voters to catch any problems.

25 The State has ignored rule-making petitions by my

1 client, Coalition for Good Governance, and Jeanne Dufort. They
2 have obviously ignored the breaches in Coffee County. They
3 have ignored the Halderman report. They have ignored CISA's
4 recommendations.

5 They have placed all of their bets for making sure
6 the system is secure, safe, functioning properly on the
7 in-person voter. They rely on the voter and not just some of
8 them, but on all of them. Every voter has the independent
9 responsibility to oversee the functioning of the voting system.

10 And if you remember the Spider-Man picture, the
11 Spider-Mans are all pointing at the voter. That is who is
12 being counted on to carry the weight of ensuring election
13 responsibility -- election functionality is not compromised.

14 And the problem with the whole integrity of the
15 system requiring the voter to bear this burden is that it is a
16 fiction that they can do it and it's a fiction that they do do
17 it.

18 Voters do not check. All the studies say they don't.
19 The ones that do check can't do it. You heard that from our
20 experts, Dr. Stark, Dr. Appel, Mr. Kevin Skoglund. You heard
21 it from their experts, Dr. Adida, Dr. Gilbert. You heard it
22 from the study that they commissioned, the Georgia Secretary of
23 State's study.

24 You heard it from our fact witnesses. Aileen
25 Nakamura talked about how hard it was. Jeanne Dufort talked

1 about how it challenged her memory to do it.

2 It is unfair to make voters who may only want to vote
3 for a top level race check every race on their ballot. It is a
4 severe burden.

5 Now, the State has said that voters can avoid these
6 burdens of using these machines. One of their defenses is
7 that -- is that voters don't have to do this. They can vote
8 absentee. But Your Honor has heard a lot of evidence that
9 there are injuries that come to voters who are voting absentee.
10 Your Honor has held that in earlier orders.

11 You can't vote in your own polling place. You can't
12 vote in person. You can't -- you have to subject yourself to
13 the risks and inconveniences of applying for and receiving a
14 ballot and then returning it, making sure it is received.

15 There is a case that we have cited a few times in
16 briefings over the years, which is an Eleventh Circuit case
17 about the State is not able to subject you to a burden and then
18 argue that it is not a burden because you can avoid it some
19 other way.

20 And it was a case where a bunch of protestors had to
21 go through a magnetometer in order to be able to attend -- to
22 protest where they wanted to. And the State said, well, it is
23 not a burden and illegal search because you can go a different
24 way and protest somewhere else. And the Eleventh Circuit held
25 that is not right. You can't say that the availability of a

1 choice to avoid a burden makes the burden okay. It is still a
2 burden that still can be unconstitutional.

3 So let's turn to the other side of the
4 Anderson-Burdick balancing test, and that would be the
5 State's interest in subjecting voters to these burdens.

6 The State's interest has to make it necessary for
7 voters to suffer these burdens, and none of the interests that
8 you have heard about during this trial meet that -- clear that
9 bar.

10 The State says that they want to follow the law,
11 which requires the use of ballot-marking devices. But they
12 ignore that the very same law that has that requirement
13 replaces BMDs with hand-marked paper ballots when and if the
14 BMDs become impossible or impracticable to use.

15 The State argues that preventing mismarks is a goal
16 of making people use BMDs. In other words, if you were to fill
17 out a paper ballot, it might be ambiguous what choice you made.
18 But if you use a touch screen, it is going to force your choice
19 into a box which is unambiguous and that somehow is a benefit.

20 Obviously, it ignores the fact that what the BMD puts
21 as your unambiguous choice may not be what you actually did on
22 the screen. That is a virtue in their opinion that it produces
23 a ballot which is unambiguous.

24 The problem is, what is that relative to? Voters who
25 use hand-marked paper ballots by mail are subject to

1 potentially having their votes disenfranchised -- being
2 disenfranchised because their marks are ambiguous.

3 You heard lots of testimony that the voters in-person
4 don't face that problem. If a voter has an ambiguous mark or
5 an overvote and they put the ballot into a scanner in a
6 precinct, the scanner prompts them and then it is actually the
7 voter's choice to do that because the voter is alerted. They
8 can't just do it and accidentally lose their vote. It has to
9 be a choice.

10 So the advantage of BMDs in that situation, which is
11 in-person voting, which is the only context that we're talking
12 about, it just evaporates on that point. The mismarks is a
13 complete red herring.

14 They talk about if you go to hand-marked paper
15 ballots you're going to have a lot of difficulties with paper
16 management in large counties during early voting. And the idea
17 is you have thousands of ballot styles in a place like Fulton.
18 During early voting, a voter can go to any vote center early
19 voting location.

20 And if you're using paper only, the staff has to be
21 able to find the correct ballot style and give it to the voter.
22 And Mr. Sterling insisted that there would be lots of errors in
23 that process and people could wind up getting disenfranchised.

24 So there's two problems with that argument. Problem
25 one is that most places do this just fine, including Director

1 Evans' old location, Escambia County, Florida. While it is not
2 as big as Fulton, it is a large location that has the City of
3 Pensacola. He told you that they used early voting on paper
4 and it worked perfectly smoothly.

5 He told you that they did it with Ballot on Demand
6 printers. Every county currently has Ballot on Demand
7 printers. Ballot on Demand printers are not very expensive.
8 That is not a real obstacle.

9 The issue -- the second problem that Mr. Sterling
10 talked about is this idea of confusion. What he -- what kind
11 of goes unmentioned in that is that when you use a BMD to get
12 the voter's ballot style, you are relying on the computer to
13 give the voter the right ballot style.

14 So while it may seem like less of a problem in terms
15 of humans having to figure out how to store their paper, what
16 it introduces is a whole other problem which you are relying
17 upon the machine to show the voter the correct ballot style and
18 it -- if you thought it is hard for a voter to figure out
19 whether the printed ballot reflects what they actually voted,
20 without leaving something off or adding something, I can't
21 imagine how many voters would be able to possibly tell that
22 they have the correct ballot style on a BMD.

23 You could be seeing the completely wrong ballot
24 style. And since the ballot styles are essentially all
25 functions of the computer system, it is really an illusion to

1 say that that is somehow an improvement to let the BMD be the
2 one showing you your ballot style.

3 We talked about overvotes and undervotes. The
4 precinct scanners warn voters about that.

5 We heard about the problem of cost. There's case law
6 that cost is not a justification for violating constitutional
7 rights. I think it is *Tashjian v. Republican Party* I believe
8 has something to that effect. Administrative inconvenience and
9 cost are not valid reasons for a State to violate rights.

10 But even so, the testimony you heard on cost is just
11 not believable. You heard from Mr. Sterling that it would
12 somehow be more expensive to use paper ballots than it will be
13 to use 32,000 machines that have to be extensively tested.
14 They have to be maneuvered into and out of storage. They have
15 to be protected. You have to use chain of custody for them.

16 Even if you allow for the fact that they may not be
17 following all of their procedures, the procedures that they do
18 have are going to take up a lot of time that is going to be
19 saved if you switch to paper.

20 The idea that it is going to somehow cost more to use
21 preprinted ballots than using all of this machinery is a pretty
22 ludicrous contention on its face.

23 Finally, for the State, they tout the interest in
24 uniformity, the uniformity of using the same voting method for
25 everybody. But uniformity is voting method agnostic. You can

1 uniformly not use BMDs, just as you uniformly do use BMDs. So
2 that really isn't a factor that makes it necessary to use BMDs.

3 Finally, the State suggests that Georgians must like
4 voting on BMDs because so many of them vote in person. And
5 that again is a bit of a non sequitur. Because as Mr. Sterling
6 testified to or as you saw in a clip from him, lots of people
7 like voting in person here in Georgia because of history,
8 because as he put it, pageantry of in-person voting.

9 You heard Bill Digges talking about liking voting in
10 person maybe not for the pageantry but for other reasons. And
11 the idea that people who want to vote in person are somehow
12 fans of BMDs just because that is the only choice they have
13 is -- again, it is a total non sequitur.

14 So as you weigh the Anderson-Burdick, the
15 State's interest against the burden on voting, it is important
16 to bear in mind that the State has just not been consistent in
17 following its own laws. None of the State's interest is
18 actually makes it necessary to have voters use these machines.

19 so turning to the last bucket, which is relief, I
20 just want to reiterate what Mr. Cross said. We -- we are
21 asking the Court to permanently enjoin the State from requiring
22 or allowing counties to use BMDs as the standard method for
23 in-person voting. That is essentially what you ordered with
24 respect to DREs but with a cut and paste of the BMD system in
25 the exact same wording.

1 What happens next is not up to us and it is not up to
2 the Court, really. It is up to Georgia law, which means it is
3 the policy of the legislature. If BMDs are not possible to
4 use, the legislature has provided for what happens then. And
5 all we are asking the Court to do is enjoin BMDs because they
6 are unconstitutional and let Georgia law take effect.

7 Georgia law would require -- since BMDs would be
8 impossible, Georgia law would lead to the use of hand-marked
9 paper ballots, which are universally acknowledged by experts as
10 the most secure voting system.

11 Mr. Cross mentioned lesser-included relief. And I
12 think it is important to address why that might be something
13 the Court should consider.

14 *Purcell* is obviously an issue. The *Purcell* case and
15 the cases that have come after it prevent federal courts from
16 enjoining or affecting election practices close to an election.
17 And the idea is --

18 THE COURT: I know. Go ahead.

19 MR. McGUIRE: So our view of *Purcell* based on
20 Eleventh Circuit case law is that the outer bounds of it is
21 five months. If you look at the *League of Women Voters* case,
22 which is 32 F.4th at 1371, the Eleventh Circuit essentially
23 stayed an injunction that was about four months away.

24 But later the same year, in *Jacksonville Branch of*
25 *the NAACP v. City of Jacksonville* -- and that was November of

1 2022 -- the Eleventh Circuit decided not to stay an injunction
2 for elections that were five months away because doing so would
3 extend the eve of an election farther than we have before.

4 And Judge Boulee in this court recently concluded
5 that *Purcell* did not bar an injunction that aimed at an
6 election six months away. That was *In Re Georgia Senate Bill*
7 *202*. It is a case in this court.

8 THE COURT: I know it. Go ahead.

9 MR. McGUIRE: So by way of comparison, when this
10 Court enjoined DREs in August of 2019, that was about five and
11 a half months before the first election that was going to be
12 affected by that injunction, which was the January 28, 2020,
13 special election for HD 171.

14 So within those outer bounds of *Purcell*, if the Court
15 were to issue an order this afternoon, then five months from
16 now would be July.

17 So in our view elections after July, this Court
18 can -- has freedom to enjoin the equipment and have it not be a
19 problem for under *Purcell*.

20 But in the meantime, as Mr. Cross alluded to, there
21 are things that you can do sooner and that we would urge you,
22 respectfully, to do. One of which is enjoin them immediately
23 from stopping counties from invoking their authority to move to
24 paper ballots, as Athens-Clarke County did.

25 Second, enjoin them to prepare a real emergency paper

1 ballot plan, which they neglected to do after you have ordered
2 them to do it in 2019.

3 And finally, I think another thing that the Court
4 could do is probably order them for the fewer BMDs that will
5 remain after they are enjoined for all voters is to just test
6 them more thoroughly because they are not doing a good job of
7 testing the BMDs now.

8 And the State ignored the Court's logic and accuracy
9 ruling in 2019. And that needs to be revisited.

10 When it comes to entering an injunction, the Court
11 has a slightly different test in Anderson-Burdick.

12 Anderson-Burdick goes to the first part of the injunction --

13 THE COURT: I just want to bring to your attention.
14 You have gone for half an hour. So if you're all trying to
15 save half an hour --

16 MR. McGUIRE: We're going to save -- we were planning
17 to save 20 minutes for rebuttal. So I was going to maybe go
18 another five minutes at max. But I will try and keep it
19 tighter.

20 THE COURT: Just consider what has already been
21 covered.

22 MR. McGUIRE: Okay. Great.

23 So Mr. Cross mentioned emergency ballots is already a
24 requirement. And so therefore this is not going to be anything
25 new. It is going to be perfectly feasible for them to do what

1 they are doing now but just do it more. The public interest
2 prong is certainly satisfied by following Georgia law, which is
3 to use paper ballots.

4 So, Your Honor, I would just wrap up then. It is
5 really important that we have a voting system people can trust.
6 And the Court has said that we need a voting system that gives
7 Georgians an accountable ballot. And an accountable ballot
8 means that we need evidence-based elections which produce, as
9 Professor Stark said, defensible and contestable outcomes.

10 An accountable ballot is one that gives us confidence
11 that your vote will be counted as cast, even if ballot secrecy
12 means you can never know for certain whether it is counted as
13 cast.

14 Confidence is the key thing. You have to know that
15 you're voting in a system that has integrity. There has been a
16 lot of evidence in this case that the Court can -- from which
17 the Court can properly infer that Georgians do not trust this
18 voting system.

19 Michael Barnes said he can't even talk about the fact
20 that he works in elections any more. Joseph Kirk said he can't
21 hire people to help with elections in Bartow County.
22 Mr. Sterling alluded to being personally affected.

23 The Court has on multiple occasions referenced the
24 fact that we live in very acrimonious times, very partisan,
25 very polarized times.

1 You have the Coffee County breaches, which those
2 people regardless, without casting any sort of characterization
3 of what they did, other than it was very, very poor judgment at
4 best -- their motivations, as they have explained them, stem
5 from mistrust of the voting system. And the problem is
6 mistrust of the voting system is going to manifest on whichever
7 side loses.

8 So the fact that this case might seem in some
9 respects to have taken a partisan tinge at times, either in one
10 direction or another, is purely a function of circumstance.
11 Everybody benefits by having a voting system that people can
12 trust. And I think the train, the light, that is coming at us
13 is the November 2024 election. And the question is: Are we
14 going to be ready for whatever may happen in that election?

15 I used a military analogy in the opening about how
16 generals are always planning for the last war instead of the
17 next war. But there's sort of another military analogy which I
18 think is useful to keep in mind, which is that wars don't end
19 because the winner declares victory. They end because the
20 loser gives up and decides to stop fighting.

21 And when you have elections nobody can trust, you
22 don't give people the ability to lay down their arms in this
23 contest about what happened. When you give people a chance to
24 feel like they have been beaten fair and square and to believe
25 it, they will work to win elections. But when people suspect

1 they have been cheated, right or wrong, they aren't going to
2 take that. And eventually they are going to do worse than just
3 copy voting systems.

4 So three and a half weeks ago, I asked the Court to
5 make its decision by looking ahead to 2024, not back at 2020.
6 I told Your Honor that we understood we would be asking you to
7 make a very hard decision.

8 But as I said then, and I say now, the decision is
9 not a hard one because it is hard to know what the right
10 outcome is. What is constitutionally correct here coincides
11 with what is prudent. And what makes the decision a hard one
12 is the political moment. We would ask you to keep that in mind
13 because 2024 is going to be the test of this decision, not
14 2020.

15 And, finally, we are asking the Court -- because I
16 know it is a concern that has come up over and over again,
17 we're asking the Court to vindicate the State's sovereignty,
18 not to contravene it. We are also asking the Court to
19 vindicate our plaintiffs' rights under the Constitution.

20 The law is easy. The circumstances is less so. But
21 the evils that Georgia is asking every in-person voter to take
22 on their shoulders to guard against is going to be manifested
23 eventually in an election in this country.

24 And when that happens -- and it will -- this Court's
25 decision in this case is either going to be seen as a godsend,

1 like the 2019 order, or it will be seen as a tragic missed
2 opportunity to avoid the chaos and acrimony that will
3 inevitably be the result of a voting system that has failed
4 when we needed it to work.

5 And either way, Your Honor's decision is going to be
6 a historic one. And cases like this I know are the reason why
7 people become lawyers, and I imagine that they are also the
8 reason why people become judges.

9 And so I am glad to have been a part of it. And on
10 behalf of my colleagues, Mr. Brown and Mr. Ichter, I know we
11 all are. And I'm sure the entire MoFo team feels the same way.

12 But we urge Your Honor to adopt our requested relief,
13 both for our good and for the good of the public. And we
14 really do thank you for the chance we have had to present our
15 case to you.

16 Thank you.

17 THE COURT: Thank you very much.

18 We're going to hear from Mr. Oles, and then we'll
19 take a little break.

20 MR. OLES: Morning, Judge.

21 THE COURT: Good morning.

22 MR. OLES: I had a nice video, but so it went.

23 THE COURT: If you want to submit your video to the
24 Court and to the parties afterwards, you are welcome to do so
25 also.

CLOSING ARGUMENT

MR. OLES: Thank you, Judge.

Judge, thank you once again. I said that multiple times. But on behalf of my client and myself, we appreciate the courtesy and the dignity that the Court has shown in somewhat, I'm sure, irritating circumstances in this case.

It is no secret that my client has gone a bit of a different -- taken a bit of a different tack on this. And I would like to talk about that for a minute.

The issues -- as he sees it, the issues that were originally set for the Court in its summary judgment order and later in the pretrial order focused on the constitutional deficiencies of the Dominion BMD voting system. And the Court also observed that State officials' inaction can also harm our constitutional rights.

Mr. Davis has focused on the Court's words of a voting system as described in the order. So he views it as embracing a little bit more than just the BMD device itself, as I will explain.

His efforts have not changed focus since the filing of the amended complaint in 2019. And that is to declare the existing Dominion BMD system constitutionally deficient, enjoin the State from using the system, and prohibit the State from enforcing any laws that require use of the system.

As I'm sure the Court knows, Webster's defines a

1 system as a group of devices and not merely one device. So --
2 and he is looking at it systemically.

3 We believe that the plaintiffs have provided
4 overwhelming evidence that the Dominion BMD system is
5 irreparably unsecure. The defendants have countered that they
6 believe there is no evidence the system has been compromised
7 during live elections.

8 Mr. Davis has sought to fill that gap by
9 supplementing the plaintiffs' claims with enough evidence of
10 vote count issues from live Georgia elections to counter the
11 defendants' claim and to help his fellow plaintiffs achieve
12 judgment that they have so diligently sought for the last
13 six years.

14 While his participation was slightly limited due to
15 the late entry, we do believe still that Mr. Davis has a
16 compelling case on what he has assembled.

17 So what are the counting problems? Director Blake
18 Evans confirmed that there was a 20,000-vote drop for one
19 candidate in the span of four minutes in the 2021 U.S. Senate
20 race. Although he blamed it on the county for an older upload,
21 before admitting that he never investigated the issue, he also
22 offered no evidence as to why the other candidate's vote totals
23 did not have the same effect.

24 The DeKalb County board of election report submitted
25 by Mr. Davis and his corroborating testimony shows the Dominion

1 voting system selected the wrong winner in their May 24th,
2 2022, District 2 commissioner primary. This was only caught
3 because Michelle Long Spears, the candidate, received -- noted
4 that she received zero votes in a precinct where she and her
5 own family lived and voted. And while she could understand
6 herself having made a different choice, she did not understand
7 her husband not choosing her.

8 After a machine re-count produced the same result, a
9 hand-count audit found the DVS system selected the wrong
10 winner. Mr. Barnes attributed it to human error but did not
11 explain why a ballot alignment error could cause the system to
12 fail to count another 1,805 votes.

13 Audit logs from the SEB -- audit logs included in the
14 SEB 2022-348 report that has been placed into evidence includes
15 samples of how ballots were rejected when the scanner
16 tabulators malfunctioned.

17 The defendants could provide no evidence the
18 Secretary of State ever audited another race in the State of
19 Georgia after this happened. 20 months later, the complaint
20 remains unresolved and unexplained.

21 The Court heard evidence of a QR mismatch error that
22 causes ballots to be rejected and not counted. Mr. Evans
23 authenticated the 2022-348 complaint that establishes this
24 error existed in 65 of 67 counties surveyed. He also
25 authenticated the letter from the Tennessee Secretary of State

1 recommending at least Williamson County discontinue the use of
2 Dominion ballot-marking device system without delay.

3 He tried to claim the same error did not exist in
4 Georgia before admitting that he had never investigated it.
5 Had Mr. Evans simply read the complaint, he would have seen the
6 audit log entries from the counties throughout the state all
7 showing the same QR code mismatch error in plain English.

8 I will skip over any citation of precedent in the
9 interest of moving this forward in time, Judge, and not boring
10 your --

11 THE COURT: Fine. Of course, you will have the
12 opportunity to send it to me in whatever following submission
13 you do.

14 MR. OLES: Judge, as we see it, a key issue in this
15 case has been credibility of the State's witness. Blake Evans,
16 the director of election and voting systems, stated that he had
17 no knowledge of vote dilution or votes not counted as cast. He
18 then went on to admit that he was aware of the 2022 DeKalb
19 County District 2 primary that selected the wrong winner. He
20 also acknowledged that Coffee County had machine re-count
21 problems in the 2020 general election.

22 He said he was aware of the Fulton County duplicate
23 pristine ballot case that has been filed as *Favorito v. Wan*.
24 He also claimed that Pro V&V conducted audits in at least two
25 counties in November 2020, but no documents were produced to

1 show that they ever performed any audits or visited either
2 county that Mr. Evans named.

3 Center for Election Services Director Michael Barnes
4 acknowledged in cross-examination a letter he wrote to Bibb
5 County election supervisor stating that she could overwrite
6 in-person voted memory cards containing election records just
7 weeks after an election.

8 The cards contained ballot images, audit logs, and
9 cast vote records from the election. Under cross-examination
10 it was shown that election records had a 22-month and 24-month
11 retention period, respectively. But he apparently thought it
12 was perfectly acceptable to upload the memory card content to
13 the server and destroy the original data despite that.

14 Gabriel Sterling, the former political consultant
15 turned DVS implementation manager, admitted in
16 cross-examination that he told Joe Rossi -- Investigator Joe
17 Rossi, that he was 100 percent certain that ballots had not
18 been tallied multiple times.

19 Governor Kemp's 36-point study showed examples of
20 many ballots being repeatedly scanned or repeatedly reported in
21 the audit.

22 Lawyer, former Secretary of State Attorney Ryan
23 Germany and Blake Evans both admitted that there were
24 doubled-scanned ballots in Fulton County.

25 One of the State's experts, Ben Adida -- Ben Adida

1 praised Georgia as the first state to conduct a risk-limiting
2 audit in the 2020 general election presidential contest. This,
3 despite Dr. Stark's extensive testimony, that RLAs cannot be
4 used for BMD elections. Several defendants acknowledge that
5 Georgia actually conducted a full hand-count, which is not, in
6 fact, an RLA.

7 Another State expert, Dr. Juan Gilbert, admitted that
8 an RLA cannot detect what the ballot-marking device shows to
9 the voter. Governor Kemp's study found that the audit had 36
10 major discrepancies. These included hundreds of double-scanned
11 ballots, thousands of reported ballots. For years, the office
12 of Secretary of State claimed the hand-count audit confirmed
13 machine counted election results but not one defendant was
14 willing to say that under oath.

15 The State relies heavily on Lawyer Ryan Germany's
16 testimony. But it is not believable. It was Germany who wrote
17 in a superficial 2017 report claiming that it was standard
18 procedure to wipe out the statewide election preparation
19 servers in the former Center for Election Services at Kennesaw
20 State.

21 And I will skip over that. The Court is well
22 familiar with that.

23 Mr. Germany also minimized the claimed exposure and
24 that it did not affect the 2016 election. However, the record
25 already reflects that the entire Georgia election preparation

1 system was wide open for anyone in the world to hack during
2 this 2016 election. The record also shows that the exposure
3 was due to an open source Drupal web content manager system
4 defect that had never been updated since it was originally
5 installed back in 2003.

6 This -- this is truly the most significant
7 cybersecurity incident in Georgia history because it was during
8 a live election. And the evidence shows previous elections
9 were also vulnerable to external worldwide hacking for over a
10 decade.

11 Mr. Germany and Investigator Frances Watson implied
12 to the Court without evidence that Scott Hall's affidavit about
13 duplicate pristine ballots was false. This was in the -- in
14 Fulton County in 2020. But Mr. Germany attempted to retract
15 his statement when challenged on cross-examination.

16 Mr. Evans acknowledged that the Attorney General's
17 office submitted an amicus brief on behalf of the Secretary of
18 State attempting to block the ballots from being inspected in a
19 related active case.

20 Defendants opposed rebuttal evidence from a senior
21 poll manager that would have -- would have corroborated
22 Mr. Hall's assertions. Mr. Evans acknowledged during
23 cross-examination that there was no policy to mitigate
24 illegitimate ballots.

25 Now the Court is being asked to rely upon

1 Mr. Germany's email claiming Eric Chaney's testimony to the
2 House Government Affairs Committee included false statements.
3 Chaney said that the Secretary of State's office was not
4 helping Coffee County resolve their machine re-count problems.

5 Adverse witness Frances Watson attempted to rescue
6 Mr. Germany by saying she had no reason to believe his email
7 was inaccurate.

8 In reality, calls for forensic audits started no
9 later than an email from now Lieutenant Governor Burt Jones to
10 Butts County election supervisor as far back as November 2nd,
11 2020. The request for forensic exams in several counties was
12 included in the *Pearson v. Kemp* relief, which the Secretary of
13 State's office chose to fight.

14 Had they done their diligence to conduct the forensic
15 audits necessary to protect Georgia voters, the Coffee County
16 episode might never have occurred.

17 Frances Watson stated as an adverse witness that she
18 went to Coffee County and determined the machine re-count
19 problems were due to batches of ballots not being separated
20 properly.

21 While it is -- while neither she nor Joshua Blanchard
22 presented credentials that would qualify her to make such a
23 determination, no defense witness ever claimed that the size of
24 batches affected the accuracy of counting.

25 Third, if true, that alone would seem to prove that

1 the Dominion voting system is constitutionally deficient.

2 Problems reported by the Coffee County Board of
3 Elections to the Secretary of State's office and the Georgia
4 General Assembly are thoroughly documented in Chaney's letter,
5 which is part of the record now as Exhibit 208.

6 The spreadsheet included communications clearly
7 showing the Dominion voting system machine re-count added 39
8 votes to presidential election results with no changes in the
9 number of votes cast. It then failed to recognize any votes
10 for another 185 additional ballots that were found and included
11 in the subsequent re-count. Ryan Germany was forced to concede
12 this on cross-examination.

13 If that is not a constitutional deficiency in the
14 Dominion voting system, then what is?

15 Now that Mr. Davis has completed the record, the
16 Court may conclude that the real reason Coffee County election
17 personnel sought a forensic exam of the county server is
18 because the Secretary of State's office failed to do its job
19 and order an exam as soon as the system failed to re-count in
20 November of 2020 twice.

21 Coffee County Election Board Chair Ernestine Clark
22 explained the problems clearly to Secretary Raffensperger in
23 her December 4th, 2020, letter; although it is not clear why
24 she apparently accompanied the State to later depositions in
25 this case.

1 Paul Maggio testified that SullivanStrickler
2 imaged-copied the software on all major Dominion components but
3 was never successful in imaging the ballot-marking device.
4 Thus, constraining the plaintiffs' relief to the replacement of
5 the ballot-marking device alone simply ignores the extensive
6 security risks to all the other components of the Dominion
7 voting system, including the scanners and the county's central
8 server.

9 Does anyone really believe that merely replacing the
10 ballot-marking device when the entire system was imaged would
11 solve the security risks and credibility issues raised in this
12 trial?

13 Dr. Halderman testified that his greatest concern was
14 not the ICX BMD but the spreading of malware from the election
15 preparation server through county servers. He stated in his
16 security analysis that an attacker who infiltrates the facility
17 where Dominion prepares elections could modify the election
18 definitions distributed to all counties and thereby spread
19 malware to every ICX used in the State of Georgia.

20 It is self-evident that malware spread from servers
21 at the counties or the center for election servers shows that
22 they themselves are infected and can also infect every other
23 component in the county for every election.

24 Dr. Halderman summed up Georgia's dilemma with the
25 Dominion ballot-marking device in his security analysis when he

1 said, it was developed without sufficient attention to security
2 during design, software engineering, and testing. He
3 concluded, in my view, it would be extremely difficult to
4 retrofit security into a system that was never initially
5 produced with such a process.

6 We ask the Court to take note that after
7 three years -- three years after Dr. Halderman hacked a BMD in
8 front of the Court, the Secretary's office still ignored his
9 findings. Now, after multiple elections have been conducted on
10 this vulnerable system, he has returned to the Court and hacked
11 it again.

12 This should be enough to prove the Secretary of
13 State's office simply cannot protect Georgia voters from the
14 risks and vulnerabilities that are largely undetectable in the
15 conduct of an election. If we have not learned anything else
16 from this trial, we know that the Secretary of State's office
17 is incapable of overseeing and directing any election that
18 relies on electronic voting components.

19 Perhaps the most outstanding revel -- astounding
20 revelation uncovered -- which was uncovered by Plaintiff Davis,
21 is that no one in the Secretary of State's office admits
22 responsibility for cybersecurity. And I won't go over the
23 finger-pointing which both prior counsel have already
24 mentioned.

25 Perhaps the most profound truthful statement came

1 from Dr. Juan Gilbert. He stated there is no known way to
2 secure a digital ballot image. VOTER GA reports submitted by
3 Mr. Davis for the record provides evidence that the digital
4 balloting images from Fulton County's 2020 election were
5 electronically altered prior to final certification.

6 In fact, both this report and Dr. Stark's findings in
7 his March 9th, 2020, declaration show that Fulton County
8 certified over 17,000 votes that have no corresponding ballot
9 image at all.

10 THE COURT: All right. To the extent that it is not
11 actually in the evidence, you know, I can't consider that.

12 MR. OLES: Yes, Judge. I know that some of these are
13 still pending.

14 THE COURT: Yes.

15 MR. OLES: Thank you.

16 Dr. Appel stated in rebuttal, the consensus among
17 experts is to use hand-marked paper ballots and scanners.
18 Because if scanners don't tabulate correctly, we can always
19 just count the ballots. While this may be the consensus among
20 experts in the field, it is not true in the State of Georgia.

21 Here the government opposes sunshine for cast
22 ballots. And Georgians have waited over three years to see
23 legally sealed mail-in ballots from the Fulton County 2020
24 election. Even after a State Supreme Court victory, the public
25 is still unable to verify how many ballots -- counterfeit

1 ballots may have been there nor verify Fulton County's
2 electronic results.

3 Dr. Gilbert had it right when he said, you can check
4 your bank account but not your vote.

5 The Georgia legislature, judicial system, and
6 executive branch refused to protect Georgians' constitutional
7 rights. The legislature mandated ballot-marking devices and
8 HB 316 over security objections from many nationally recognized
9 experts.

10 The Secretary of State's office has proven to be
11 wholly inept, if not worse, its resolving the ensuing problems.
12 Georgia State courts have already ignored this Court's previous
13 conclusions that the Dominion ballot-marking device voting
14 system violates two Georgia laws.

15 The Court has urged the parties to resolve this
16 matter, but the State continues to delay resolution after
17 six years. This case has probably amassed the most
18 comprehensive set of evidence ever assembled in a Georgia
19 election case.

20 But if plaintiffs are not granted full relief from
21 the Dominion BMD system, this case may be remembered for the
22 evidence that Mr. Davis was -- was not able to obtain instead
23 of the evidence that was actually uncovered.

24 Georgia's Dominion Democracy Suite 5.5 BMD system has
25 already been discontinued in Tennessee, replaced in Colorado,

1 and it was rejected in Texas before it was purchased in
2 Georgia.

3 We all want to secure our 2024 general elections.
4 Georgia's approach to auditing elections is totally inadequate
5 to ensure constitutionally sufficient protection for voters.

6 And it is self-evident that the State is unwilling
7 and unable to alleviate the constitutional infirmities from
8 deficient auditing practices and secretive storage of election
9 ballots.

10 While the Court cannot dictate the precise solution
11 needed, it can conclude that the entire Dominion ballot-marking
12 BMD system is constitutionally deficient.

13 THE COURT: I think you're at more than 20 minutes at
14 this point.

15 MR. OLES: Okay.

16 THE COURT: So I think I've got the gist of your
17 argument. Don't I?

18 MR. OLES: You've got it, Judge.

19 THE COURT: Okay. I had one --

20 MR. OLES: Thank you once again.

21 THE COURT: You're very welcome.

22 And you referenced Governor -- the Governor's 3600
23 or --

24 MR. OLES: 36-point.

25 THE COURT: I was wondering what you were referencing

1 specifically in that -- his 36-point study or whatever. What
2 was the document you were referencing?

3 MR. OLES: The particular point?

4 THE COURT: Well, what was -- is there a document
5 that you were referencing in that connection?

6 MR. OLES: There is -- attached to the Governor's
7 letter is his -- is the 36-page -- well, it is 36 pages --
8 study that his staff undertook. And that is what I was
9 referencing.

10 THE COURT: All right. Can you give me the document
11 number later?

12 MR. OLES: Yes, Judge.

13 THE COURT: All right. Thank you.

14 MR. CROSS: Your Honor, there is one quick important
15 point I just need to clarify so the State has accurate
16 information for when they respond. Mr. McGuire made a
17 reference to individuals in Coffee County potentially doing
18 what they did because they distrust the system.

19 I want to be crystal clear about this. For the
20 Curling plaintiffs, we are not in any way suggesting that a
21 constitutional standard must satisfy the distrust of bad
22 actors.

23 I don't think that is what Mr. McGuire was
24 suggesting. But to the extent there is any confusion about
25 that, we have articulated the standard on voter verification

1 and reasonable security. That is the standard. Not satisfy
2 people peddling election fraud.

3 I want to be very clear about that so the State
4 understands our position.

5 MR. MCGUIRE: And since I said it, I'll echo that.
6 That certainly wasn't the gist of what I was saying. The gist
7 of what I was saying is that we need trustworthy elections.
8 That is it.

9 THE COURT: All right. Well, it is basically 1:14,
10 1:15 for purposes of anything else.

11 Let's start in 30 minutes then.

12 COURTROOM SECURITY OFFICER: All rise. Court will be
13 in recess for 30 minutes.

14 **(A lunch break was taken.)**

15 THE COURT: I don't think Ms. Marks and her counsel
16 are here.

17 **(There was a brief pause in the proceedings.)**

18 THE COURT: Before we proceed with the -- with the
19 defendants' argument, I just wanted to say at the conclusion I
20 would like to talk about findings of fact, other things that we
21 have to get done and less -- I mean, it doesn't mean you can't
22 breathe, congratulate yourselves for being through. But don't
23 leave because we still have to deal with the issues of what is
24 next in terms of work.

25 And so I just wanted to flag that because I could see

1 losing control of this right at the end.

2 Okay. All right.

3 MR. TYSON: Your Honor, if I could approach? I do
4 have copies of our presentation for you.

5 THE COURT: Okay. Another set of notebooks. How
6 wonderful?

7 MR. TYSON: Okay.

8 THE COURT: Am I jumping in between or --

9 MR. TYSON: They are all together, Your Honor.

10 THE COURT: All together?

11 MR. TYSON: No. I'm sorry --

12 THE COURT: They are duplicates. I don't have
13 two notebooks, no Volume I and Volume II.

14 That is what I was worried about.

15 CLOSING ARGUMENT

16 MR. TYSON: Well, thank you, Your Honor. Bryan Tyson
17 for the State.

18 It is obviously, as I think others have mentioned, a
19 privilege to reach this point in the case. I do think I'm the
20 first person, maybe besides Mr. Oles, who is a Georgia voter,
21 who, like other Georgians' votes on the BMDs, is proud to do
22 so. And I want to present our -- just our view in terms of
23 this case, and we have reached a long journey to get here.

24 And we obviously have Hamilton back at the Fox. And
25 I ran across a quote from Alexander Hamilton about the right to

1 vote. He said, a share in the sovereignty of the state, which
2 is exercised by the citizens at large, in voting at elections
3 is one of the most important rights of the subject, and in a
4 republic ought to stand foremost in the estimation of the law.

5 And as Your Honor knows, I have represented election
6 officials at the State level and the county level in dozens of
7 cases. Those officials uniformly take incredibly seriously
8 their role in protecting the right to vote of Georgia citizens.

9 Over the course of the plaintiffs' presentations
10 today, Your Honor, we have heard those officials called inept.
11 We have had them accused of breaking Georgia law. We had
12 statements about how they have so little regard for election
13 security.

14 And, Your Honor, I just want to emphasize at the
15 beginning the most important of rights, the right to vote,
16 matters as much to these election officials as it does to any
17 Georgia voter.

18 We've heard testimony from election officials in
19 Georgia who talked about they don't tell their children what
20 they do for a living because of how toxic this environment has
21 gotten. We have heard from an election official with pride who
22 took her daughter to vote for the first time and how proud she
23 was of that.

24 So in the midst of all of this, I just think the
25 accusations and the innuendos against election officials needs

1 to be careful. The NASEM report that we have talked about here
2 talked in its beginning about those who cast doubt on the
3 integrity of the election process. It talked about dedicated
4 and enlightened election officials from across the nations at
5 all levels of government who are working tirelessly to ensure
6 the integrity of the results of elections.

7 And so as we approach the issues in this case, these
8 issues are serious and they are serious because they have --
9 you have dedicated people working hard to get this right, often
10 at great personal sacrifice as we saw in both 2018 and in 2020
11 in Georgia.

12 So we're here to talk about the right to vote. But
13 we're also here to talk about the particular location where
14 we're having this conversation. In federal courts, as this
15 Court is aware, are courts of limited jurisdiction. You do
16 have a lot of power in crafting an injunction. Federal courts
17 often do have good ideas about how to run elections. But the
18 boundaries of what you are able to do is the Court is
19 constrained by the Constitution.

20 Because when we begin with the Constitution, we see
21 that Article I Section 4 says the primary branch of government
22 that deals with questions regarding elections is the states, by
23 the legislature thereof.

24 So the primary place where election decisions and
25 decisions about election administration are made is in the

1 political branches of government. That is the primary
2 location.

3 And even if a particular election practice or system
4 isn't perfect, as we went through in detail in the *Fair Fight*
5 *Action* case, Judge Jones found the system wasn't perfect but it
6 didn't violate the Constitution.

7 As you have done in Georgia Shift and have indicated
8 in this case as well, you can't and no one can guarantee a
9 flawless election. We obviously stand behind the hard work of
10 election officials and election results in Georgia. We have
11 confidence in those results. But at the end of the day, the
12 question for the Court, because you can't oversee the
13 administrative details of an election, is does Georgia's
14 system -- its reasonable and nondiscriminatory rules violate
15 the Constitution. And that is the question we're here to
16 answer.

17 So in terms of how we're going to approach the
18 structure of our closing today, I'm going to begin with my
19 favorite subject, which is standing. I know that is not
20 everybody's favorite topic. Judge Jones told us I think when
21 Mr. Belinfante was discussing standing in *Fair Fight* he was
22 most surprised to not see me making that argument. But I'll be
23 making that argument today.

24 If I can't convince you on jurisdiction,
25 Mr. Belinfante will cover the Anderson-Burdick and merits

1 issues.

2 And then Mr. Miller will cover the other factors of
3 the permanent injunction and the remedy side of things.

4 THE COURT: Am I supposed to vote at each section? I
5 think they are coming up, no matter what, though.

6 MR. TYSON: Probably so.

7 So, Your Honor, obviously I don't want to belabor the
8 test. We know what standing is.

9 THE COURT: Thank you.

10 MR. TYSON: And I was a little surprised to hear
11 Mr. McGuire say it was uncontested, of course.

12 THE COURT: I was surprised too.

13 MR. TYSON: We believe it is contested.

14 We know the three-part test we have to deal with.
15 And the plaintiffs have to show an injury for each claim and
16 for each form of relief that they are seeking. And so again, I
17 know we've had a discussion about different types of injuries.
18 We have to work through the injury side.

19 We also for a corporation have to work through
20 diversion of resources. The diversion has to be from *City of*
21 *South Miami* about something that is concrete and imminent. So
22 we'll talk about those pieces.

23 And then once we get past the injury prong, we then
24 have to answer the question about traceability. We have talked
25 about the role of states and counties in elections.

1 Unfortunately, you're going to hear a little bit more about
2 that today.

3 It matters in terms of what types of orders this
4 Court can enter. And again, as we saw in the 2020 election --
5 post election litigation, often counties were the entities that
6 needed to be sued but someone would sue the Secretary instead.

7 Finally for redressability, there must be a
8 likelihood, not just merely speculative, that the injury will
9 be redressed by a decision from the Court.

10 So, Your Honor, what I want to do is begin with the
11 injuries that have been alleged and the evidence that is before
12 you and go to your summary judgment order where you discussed
13 the substantial risk of injury to CGG's members' right to have
14 their votes counted as cast, if they are required to vote on
15 the BMD system.

16 And so we want to get into that because it does again
17 matter at trial. Even if there has been a sufficient showing
18 earlier in the case, the plaintiffs must now come forward with
19 evidence at trial of their standing.

20 And we do so out of a lens of the recognition that if
21 a single voter is specifically disadvantaged, if a vote is
22 counted improperly, even if that affects an outcome, the
23 Eleventh Circuit has told us that is a generalized grievance
24 that is not particularized to that individual voter.

25 So plaintiffs' injury cannot be that there is a

1 chance that someone else's vote was counted improperly or that
2 the improper tabulation of the vote might affect the outcome.
3 And the reason for that is it is ultimately shared by every
4 Georgia voter. That's what Judge Grimberg found in the *Wood*
5 cases after the 2020 elections. There is nothing unique to
6 that because it is suffered equally by all voters.

7 And third, if irregularities in tabulation are not
8 the answer, because those are also affecting all voters
9 equally, back to the Eleventh Circuit, the irregularities don't
10 affect anybody differently than anyone else. And if the
11 allegation just is the law is not being followed -- and I heard
12 a lot in the plaintiffs' claim that there is some provisions of
13 Georgia law that are not being followed. If the allegation is
14 Georgia law is not being followed, then the Eleventh Circuit
15 tells us that is a generalized grievance and is not
16 particularized and appropriate to show an injury in this court.

17 So what does the evidence that you have before you
18 show? First, the plaintiffs have uniformly agreed that they
19 have no idea how a hand-marked paper ballot is tabulated by a
20 scanner. In other words, they do not have the ability to
21 determine if their vote is counted as cast on their preferred
22 method of voting of hand-marked ballots.

23 Ultimately there is a trust that happens in the
24 system. You put the ballot into the scanner. Each of the
25 plaintiffs testified about this. And there cannot then be an

1 injury if in every voting system the voter is unable to verify
2 if their vote is counted as cast.

3 Now, the primary response is, well, I marked -- I
4 know I marked the ballot versus I don't know what the
5 ballot-marking device ballot said. Again, the scanner is not
6 reading -- it is reading a point.

7 We have heard on questions of vulnerability the
8 scanner could be affected. And then if there is a question,
9 you go back to the ballot. If there is a question in the
10 ballot, you go back on the BMD ballot to the human readable
11 portion, on the hand-marked ballot to the mark made by the
12 voter.

13 So, Your Honor, we would submit initially there
14 cannot be an injury for counted as cast unique to the BMD
15 system because that is shared by all voting systems as the
16 plaintiffs themselves have told you.

17 Further, it emphasizes the point that Mr. McGuire
18 made trust in elections matters. And ultimately what the
19 plaintiffs have said in this case at trial is they don't trust
20 the BMD system to count their votes.

21 Secondly, the plaintiffs and their experts have told
22 you they have no evidence that any vote cast on a BMD has ever
23 been incorrectly counted or that any BMD in any election has
24 actually been hacked.

25 And to Mr. Oles' credit, I think he at least has made

1 that allegation. The Curling and the Coalition plaintiffs have
2 not.

3 So that means the only possible basis for an injury
4 based on some misprogramming or hacking of a BMD has to be a
5 possible future harm because it hasn't occurred before.

6 And what have the plaintiffs themselves and their
7 experts told you about possible future harm when there is
8 vulnerabilities? Again, in the letter they signed -- the
9 experts signed after the 2020 election, they said merely citing
10 the existence of technical flaws does not establish that an
11 attack occurred, much less that it altered an election outcome.

12 And then here is how they phrased it, it is simply
13 speculation.

14 THE COURT: When you say experts say, who are you
15 referring to?

16 MR. TYSON: So, Your Honor, this is the letter that
17 Dr. Halderman, Dr. Appel, Dr. Gilbert, Mr. Hursti, and others
18 signed after the November 2020 election about allegations for
19 that election.

20 THE COURT: All right. Is it an exhibit in the
21 record?

22 MR. TYSON: It is. Defendants' Exhibit 67, and it is
23 in evidence.

24 THE COURT: Okay.

25 MR. TYSON: So, Your Honor, Mr. McGuire proposed a

1 few additional possible injuries.

2 The injury as a result of ballot secrecy, which
3 either means that people can see the screen and how you are
4 voting. I believe in the Coalition plaintiffs' view or in the
5 Curling plaintiffs' view that no one could see the screen and
6 so you could implement a hack on the device or QR code is an
7 informational injury. Again, these are all generalized
8 grievances because they are shared by all Georgia voters.
9 There is nothing particularized to the plaintiffs in this case.

10 Similarly, the idea that reviewing a BMD ballot is an
11 injury is likewise something that would be shared by every
12 in-person voter in Georgia, which would also be a generalized
13 grievance and not sufficient as an injury.

14 So, Your Honor, we would submit that the evidence at
15 trial has shown that counted as cast is either a generalized
16 grievance that is shared by all voters, which can't be an
17 injury, or it is not an injury at all. Because no voting
18 system can provide the kind of assurance the plaintiffs say
19 lacking it is an injury. Or that the plaintiffs have only
20 shown a speculative future injury, using their expert's words,
21 not that the injury is certainly impending, which is the
22 requirement to have an injury in the court.

23 So any one of those items means that there is no
24 injury for purposes of the Court's jurisdiction.

25 And I want to be clear, that we stand fully behind

1 Georgia's election results in 2018, 2020, and 2022. This,
2 again, is a jurisdictional issue and was the basis for
3 dismissal of, I think, all of the post 2020 litigation that was
4 brought about Georgia's election system.

5 So that is the individual plaintiffs.

6 Moving to the Coalition for Good Governance,
7 Mr. McGuire has cited two possible bases for standing. The
8 first is associational standing. And that places us squarely
9 into the *City of South Miami* case. The issue here is that the
10 plaintiffs would suffer -- the Coalition would suffer the same
11 infirmities of an injury that an individual would.

12 So in associational standing, since they are standing
13 in the shoes of an individual, if an individual was not able to
14 bring those claims, the organization could not bring it on
15 their behalf either.

16 The Eleventh Circuit has also explained that the --
17 you cannot have associational standing based on a subjective
18 fear of harm, which again gets us back into the same basis of
19 the fear of hacking speculation about an alteration of election
20 results and possible future harm.

21 So for those, Your Honor, even if we get past that as
22 a legal matter, the evidence at trial, which is the evidence to
23 be considered here, still does not support associational
24 standing. Again, we have the same problems with individuals
25 for an associational standing claim.

1 In addition, you have CGG members who are plaintiffs
2 which raises questions about statutory standing, separate from
3 Article III, and third-party standing if you have members who
4 are plaintiffs, which we do, does the organization have a right
5 to bring that, especially when it does not have its own,
6 obviously, right to vote in that situation under 1983.

7 But the evidence also showed that CGG cannot identify
8 its members. It doesn't know if it has members in every
9 county. This is unlike other associational standing cases
10 where there was evidence of the NAACP, for example, that had
11 members in each Georgia county and could assert these types of
12 claims.

13 So we would submit there is no basis to conclude
14 associational standing exists.

15 Moving to organizational standing, which is what this
16 Court discussed in the motion for summary judgment order,
17 again, that was when it was -- you had to cast presumptions in
18 favor of the plaintiffs. The Eleventh Circuit in *City of*
19 *South Miami* quoted the Sixth Circuit favorably in that case
20 where it said an organization can no more spend its way into
21 standing based on speculative fears of future harm than an
22 individual can.

23 And when we look at that Sixth Circuit case that the
24 Eleventh Circuit cited, we see what the allegations were there.
25 It was system vulnerabilities with the voting system. It was

1 previous equipment malfunctions, past election mistakes.

2 And what the Sixth Circuit concluded in the case the
3 Eleventh Circuit relied on was that past occurrences of
4 unlawful conduct do not create standing sufficient to get an
5 injunction against the risk again of future unlawful conduct.

6 So applying that legal standard to the evidence you
7 have before you here, at summary judgment you recognized the
8 plaintiffs had to carry their burden of standing at this point
9 without presumptions in their favor. And they have not. The
10 evidence shows the right to have their votes counted as cast
11 cannot be vindicated on any election system under the evidence
12 that is before you.

13 The imminence of the potential harm was also
14 construed in the plaintiffs' favor at summary judgment. And as
15 we get into some of the merits, the changes that the State made
16 Mr. Belinfante will discuss, I think go to the imminent
17 question as well. And ultimately, it is not law of the case.
18 Again, the plaintiffs have to show at each stage that they have
19 met the continuing need to have a jurisdiction for this Court.

20 The facts also showed that there is not a diversion
21 of resources that is legally cognizable here. So the facts
22 show CGG, to the extent it is diverting resources, is doing
23 that based on speculative fears, just like the individual
24 plaintiffs. Again, that does not meet the imminence
25 requirement.

1 And the evidence on diversion is that the diversions
2 are the result of CGG's spending on this litigation. Its
3 efforts to counteract the State policy it opposes or the State
4 practice it opposes are this lawsuit. It is not generally
5 engaged based on the evidence before you in other activities.

6 And as the Sixth Circuit explained, again, in the
7 *Shelby* case, spending on litigation is not enough to get you to
8 an injury that opens the door to federal court.

9 The last point I'll make about the organizational
10 standing piece, the post 2020 cases as I referenced were
11 uniformly decided on a lack of a particularized injury to
12 individuals. And it would be a strange way, I think, to read
13 the law that if Ms. Powell or Mr. Wood or others who brought
14 post election litigation in 2020 had just incorporated an
15 entity to file the lawsuits -- we could call it Kraken, Inc. --
16 that somehow that would have converted their non-justiciable
17 generalized grievances into justiciable particularized
18 injuries, especially when you have a corporation that doesn't
19 have a right to vote, unlike an individual who does.

20 So that is essentially the evidence you have before
21 you. CGG exists to litigate. And that alone cannot transform
22 speculative future harm that an individual couldn't bring to
23 this Court into a particularized injury.

24 So we would submit that at this stage, with no
25 presumptions applied, the plaintiffs have not shown an injury

1 to them as individuals, to associational interests, or to the
2 organizational interests. And we would submit the Court should
3 apply the same approach as the post 2020 cases and dismiss for
4 lack of a particularized injury.

5 Moving to traceability and redressability, the Court
6 discussed the various challenges that could be brought,
7 different meaningful relief short of ordering hand-marked paper
8 ballots in its summary judgment order.

9 But as we'll discuss as we get into the day-to-day,
10 the evidence at trial has foreclosed those possibilities. The
11 evidence that you have heard is that eliminating QR codes will
12 not address the plaintiffs' injuries. Not adding audits. Not
13 adding additional logic and accuracy testing. Not doing
14 upgrades to software that would remediate vulnerabilities.

15 The plaintiffs have provided you with no evidence
16 that there is anything that will redress their claimed injuries
17 short of banning the use of ballot-marking devices.

18 Now, we have heard discussions about the role of
19 states and the role of counties for the traceability and
20 redressability point. It is critically important that this
21 Court recognize that as a matter of law, as a matter of
22 practice counties run elections in Georgia with assistance from
23 the State.

24 We've had the *Fair Fight* decision that covered that.
25 And ultimately, again in a post *Jacobson* world, you can't bind

1 the counties through the Secretary because the counties have
2 their own independent legal obligations for how they conduct
3 elections.

4 In addition, I think it is also important to
5 distinguish between traceability as a matter of jurisdiction,
6 which is the *Carnival Corporation* case the Court relied on at
7 summary judgment addressed and causation under 1983. We'll
8 talk a little bit more about that as we move along.

9 Plaintiffs have also now proposed a few different
10 options for lesser relief. Again, relief that requires
11 compliance with Georgia law throws us back into generalized
12 grievances. And enjoining of 21-2-300 I'll talk about in a
13 minute.

14 And then in order just to more thoroughly do existing
15 types of testing, as Mr. McGuire proposed, again not only
16 places this Court in the administrative details of an election
17 but also raises an issue with who is doing the particular
18 testing. The evidence shows logic and accuracy testing is
19 carried out by counties, not by the State. And we have no
20 counties left in this case.

21 So in terms of the evidence that you have heard, the
22 evidence also shows that any sort of relief that plaintiffs are
23 asking for would generally be costs on the counties, whether
24 that is the purchase of additional printers, whether that is
25 other things they would have to do. Those would be costs borne

1 by counties.

2 And enjoining 21-2-300 where nonparty counties could
3 then decide to use a different voting system, for example, than
4 the ballot-marking device system would still not redress the
5 plaintiffs' injuries because the counties would still be able
6 to choose whether to use the BMD system or not. If every
7 county chose to use that BMD voting system in the future, an
8 order enjoining the Secretary does not get to a redress of the
9 plaintiffs' injuries.

10 Finally, on audits, the evidence also shows that
11 audits are carried out by counties. And the Secretary has no
12 authority to order counties to conduct more audits under the
13 current legal structure today.

14 And so, Your Honor, the remedies that have been
15 proposed run headlong into a *Jacobson* problem, which is you are
16 unable to bind the counties by binding the Secretary and the
17 State Election Board.

18 Last point for me, Your Honor, is the one-plaintiff
19 rule. This Court rooted its decision in summary judgment on
20 the rule that as long as one plaintiff has standing you don't
21 need to address the standing of other plaintiffs.

22 And in looking at the cases the Court relied on for
23 that, the cases involved single complaints. So even in the
24 *Shaw* case that you discussed regarding fee issues, the only
25 reason the intervenors, who were a separate group, were allowed

1 in the case and to recover fees was because they were allowed
2 to intervene on the condition they adopt the plaintiffs'
3 complaint.

4 So we would submit that at this point in the trial,
5 especially hearing some of the differences in the relief that
6 is being sought, between the Curling plaintiffs and the
7 Coalition plaintiffs, that when this Court writes its order, it
8 will need to address the standing of Curling, Coalition, and
9 Mr. Davis in terms of the ability to bring these cases.

10 At the very least, we submit you would need to find
11 the Curling plaintiffs lack standing because they are only
12 individuals even if the Coalition plaintiffs do have
13 organizational standing. So we'll discuss more about those
14 different parts of relief as we get into the remedy side of the
15 equation this afternoon.

16 But we would submit that the plaintiffs who lack the
17 ability to invoke this Court's jurisdiction should be dismissed
18 from the case.

19 THE COURT: Could you hold there for one second?

20 **(There was a brief pause in the proceedings.)**

21 MR. TYSON: Your Honor, with that, I'm going to hand
22 things off to Mr. Belinfante. I did just want to, since this
23 may be the last time I have a chance to address the Court in
24 this trial, just to thank you, thank the staff, everybody's
25 hard work along this way. I know it has been a long journey

1 for all of us.

2 It is a privilege to get to represent election
3 officials who work really hard. And I have the privilege to
4 get to stand before you and argue this case.

5 So thank you, Your Honor.

6 THE COURT: Thank you, sir.

7 CLOSING ARGUMENT

8 MR. BELINFANTE: Good afternoon, Your Honor.

9 THE COURT: Good afternoon.

10 MR. BELINFANTE: Like Mr. Tyson, I want to start by
11 thanking the Court and your staff. I know that y'all have
12 received communications from us at night, on the weekends.
13 They have not always been flowery toward one another. We
14 appreciate your patience and your time with this case for sure.

15 We know it is a difficult one. And we know that it
16 is one that the Court has spent a very long time with in a very
17 significant record.

18 But what we heard today -- I, frankly, have had to
19 change a fair amount of what I had been prepared to say. And
20 unfortunately it is because what we have seen is plaintiffs and
21 their own experts who have acknowledged that there is no
22 evidence that a vote in Georgia was not counted as cast.

23 Further, they have all acknowledged that their
24 preferred choice -- and I'll get to why it is the only thing
25 they want -- hand-marked paper ballots -- you still don't know,

1 they still don't know if they are counted as cast. It is a
2 policy debate. And when there is no actual injury, they fall
3 back on risk. And when there is no evidence quantifying that
4 risk, it turns into an attack on public officials and
5 misrepresentations.

6 We've seen this before. In *Fair Fight*, there were
7 unfounded claims of voter suppression, racially motivated
8 policies, and attack on State officials like I just sat through
9 for the first hour and on of the day.

10 Judge Jones heard the evidence in six weeks of trial
11 and ruled completely for the State and upheld the integrity of
12 Georgia's elections.

13 In *Pearson*, we heard what is the next logical step of
14 the plaintiffs' argument. Recall that the plaintiffs told this
15 Court in their complaints that the Dominion machines are,
16 quote, inherently unsafe and must be presumed to be hacked.
17 The *Pearson* plaintiffs just went the next step and said that
18 they were. Judge Batten dismissed the case.

19 In the *Anderson v. Raffensperger* case, Judge Brown
20 heard arguments about lines in Fulton County, Bibb County,
21 Chatham County, and a few others in Georgia. He dismissed the
22 State because he recognized that the problems were
23 county-based, not that of the State. And he also recognized
24 that the plaintiffs in that case were attempting to substitute
25 the views of an academic, in Judge Brown's words, for the

1 wisdom of the State legislature.

2 Now we have a case with far less evidence than *Fair*
3 *Fight*. We have attacks on Georgians, who unlike the
4 plaintiffs, choose to vote on machines. And you have heard
5 testimony that 91 percent of Georgians vote on ballot-marking
6 devices. You've heard that Georgians -- we don't read ballots.
7 We don't check them. The UGA report says that 80 percent do.
8 So what happens then? You attack UGA.

9 They say that our government officials break the law
10 and they don't like that they have been reelected. And now we
11 get pictures of Spider-Man representing public servants who
12 have done immense work in incredibly challenging times who just
13 simply don't agree with their expert and like Georgians, and
14 like the General Assembly, and like the SAFE Commission, as the
15 evidence has shown again and again, do not agree with the
16 plaintiffs.

17 That is not a constitutional injury. And the
18 evidence makes that clear. We can look at Georgia elections
19 overview and see one of the glaring problems with the
20 plaintiffs' complaint. They are suing for what they claim --
21 or what they say are State issues of which the State has no
22 control.

23 Yes, Dr. Halderman came into court and in a situation
24 like this, where there is no poll watcher who sits and makes
25 sure and is sworn to an oath to see that individuals don't

1 tamper with machines, was able to reach behind with a pen.
2 Because Dr. Halderman knew exactly what to do. And he
3 explained it. He is a professor at Michigan. No one questions
4 that Dr. Halderman is a very intelligent man.

5 Remember the law Mr. Cross told you says you can't be
6 near someone. It is six feet. Six feet away. About as far as
7 I am now. There's poll watchers. There's poll managers.
8 There's poll workers. There's other voters. We're supposed to
9 presume, because they have no evidence, that someone is not
10 going to notice someone unplugging a USB cord, plugging
11 something in -- and we saw on the video -- has a screen that
12 looks like the Matrix with things going back and forth that you
13 know are not supposed to be on the screen. This is why they
14 focus on risk.

15 So when you look at the Secretary of State versus the
16 State Election Board and County Election Superintendents, it is
17 important to recognize the size of the Secretary of State's
18 office. The Secretary's position was called today an
19 absurdity. They have \$7 million in their budget approximately
20 for the elections division. They have 25 full-time employees.
21 Many of whom were attacked today needlessly.

22 They say in their slide on Page 20 -- the Curling
23 plaintiffs say that they are not challenging the BMDs
24 generally. The evidence does not support that. Their experts
25 do not support that. There is no solution, as Mr. Miller will

1 tell you, that their experts say will resolve the question of a
2 risk of a vote not being counted as cast, except for what this
3 Court said it cannot do, which is require hand-marked paper
4 ballots.

5 They cite an August 1, 2018, in their closing, letter
6 from then Secretary Kemp, and say that the State is violating
7 the law because the State is the only one taking the position
8 of whether the machines are inherently dangerous or not. There
9 is no evidence because Mr. Sterling said he was unaware of the
10 current policy. But it made for good fodder.

11 The Secretary's role is far more limited than they
12 would have the Court believe. Yes, the Secretary does
13 determine modifications, upgrades, and changes to election
14 equipment. You heard testimony from both Blake Evans and
15 Gabriel Sterling as to why upgrading to a new level of software
16 for Dominion now is simply not practical and would cost
17 \$25 million but would not be available for the November 2024
18 election regardless.

19 Yes, they authorize the movement of voting system
20 equipment. And you heard from Gabriel Sterling about how that
21 process has been enhanced recently.

22 You didn't hear it from the other side. But now look
23 at this. These are the rules affecting counties and governing
24 what counties do and county election superintendents. This is
25 not passing the buck. This is not pointing fingers. This is

1 the law.

2 So let's look in that environment at the plaintiffs'
3 substantive claims. The Court is aware of them. There are two
4 constitutional claims for both the Curling and the Coalition
5 plaintiffs. That would include Mr. Davis at this point.

6 And the summary judgment order, the pages I have
7 used, Your Honor, are from the Westlaw version, not the docket
8 version. There is no argument -- and we're all in agreement --
9 that the Anderson-Burdick is the test that will apply to the
10 entirety of plaintiffs' claims.

11 And we are at trial to determine factually what is
12 the character and magnitude of the burden that plaintiffs claim
13 imposes on their right to vote and then weigh that burden
14 against uncontested State interests. The only people that
15 offered evidence on State interests was the State itself.

16 And the only people that offered evidence on actually
17 administering elections in Georgia, whether it be the
18 Secretary of State's office or Mr. Kirk from Bartow County, was
19 the State.

20 But the first factor as the Court noted on Page 45 is
21 really three: What is the burden? How is it imposed or
22 causation? And what is the allegedly unconstitutional conduct?
23 And we'll go through those.

24 The alleged burden. We know from Burdick that if a
25 State regulation that is challenged is reasonable and

1 nondiscriminatory, it will generally be upheld on a light
2 review. Here, I am guessing, that the policy that is being
3 challenged is 21-2-300, which requires the uniform use of
4 voting equipment and specifically ballot-marking devices for
5 in-person voting in Georgia. Hand-marked emergency paper
6 ballots remain available.

7 If it is an ordinary and widespread burden, it is not
8 subject to strict scrutiny. Now, that begs the question: What
9 would a discriminatory restriction be? And in many cases it is
10 about exactly that. It could be like in *Fair Fight*, the exact
11 match policy that was challenged and said that was
12 discriminatory via disparate impact.

13 But let me offer you another hypothetical. The
14 plaintiffs have told the Court time and time again these
15 machines are not good enough for Georgia voters. They are
16 inherently risky. They must be presumed to be hacked. But if
17 someone is disabled and cannot complete a hand-marked paper
18 ballot, these will do just fine.

19 Now, imagine that, Your Honor. A law that says the
20 disabled must vote on an unconstitutional machine but everybody
21 else gets to use a constitutional method of voting. It is why
22 Dr. Gilbert testified and said separate is not equal.

23 Here the Court understood -- and this is the Court's
24 identifying of what the injury is -- the risk of harm of their
25 ability to cast an effective accurately counted vote. Here the

1 plaintiffs, again, do not challenge a specific State policy,
2 law, or regulation.

3 Judge Jones answered the same thing in *Fair Fight*.
4 There the challenge was because the State had -- one of the
5 challenges. Because the State had not updated the poll worker
6 manual that that was the policy being challenged. But what
7 Judge Jones said on Page 1203 of the order is that the failure
8 to update and change materials were not the implementation of a
9 state statute, regulation, or policy. Accordingly, the Court
10 finds that the Anderson-Burdick analysis is not applicable.

11 Here, they are asking the State to update its own
12 policies. Why? Because Dr. Halderman said so. Under *Fair*
13 *Fight*, that is not an Anderson-Burdick claim. But this is the
14 environment in which plaintiffs bring their claim. The Court
15 has recognized and each of the plaintiffs who testified has as
16 well that no election is flawless. It is undisputed.

17 The Court has also said that it is true electronic
18 voting systems are not per se unconstitutional. And numerous
19 times throughout the trial the plaintiffs argued that that
20 wasn't their argument. They weren't saying that. But here's
21 the key. In this environment, the Court said on Page 2 of the
22 Westlaw version of the order, quite simply the Court has the
23 legal authority to identify constitutional deficiencies with
24 the existing voting system, but it does not have the power to
25 prescribe or mandate new voting systems, i.e., a paper ballot

1 system to replace the current legislatively enacted system.

2 So what did the plaintiffs do? They came to you and
3 they said, Your Honor, we're not asking you to impose
4 hand-marked paper ballots. We just want you to prevent these
5 machines from being used for everyone but the disabled. What
6 does that leave counties with, Your Honor? The DREs are gone.
7 They are not certified. That leaves hand-marked paper ballots.

8 To his credit, Mr. Oles and Mr. Davis are being
9 intellectually honest about it and saying, we want hand-marked
10 paper ballots. That is where the case ends. If there was any
11 doubt of that, at least for the Coalition's concerns, Ms. Marks
12 tells everyone on May 2nd, 2021, that South Carolina is like
13 Georgia. It uses unauditable BMD touch screen machines. We
14 can never, ever know who won in South Carolina or Georgia
15 because the use of these machines in polling places,
16 Defendants' Exhibit 194.

17 She also agrees that BMDs and the Coalition should
18 not be used by voters who are able to mark an optical scan
19 ballot with a pen. Why? Because you'll never know how the
20 election works. As Mr. Miller will talk about, Dr. Stark says
21 the same. You can't audit an election that uses any BMD.

22 And so it is no wonder Mr. McGuire says when people
23 suspect they have been cheated, right or wrong, they aren't
24 going to take that and eventually they are going to do worse
25 than just copy voting systems.

1 So what is the burden on voting again? The Court
2 identified three things to look at here: The 2021 Halderman
3 report, the CISA 2022 report, and Coffee County. Obviously I
4 know the Court will look at more. But these were the things
5 highlighted in the summary judgment order that had changed at
6 least since the time of the preliminary injunction order.

7 What hadn't changed though? No witness knows of any
8 Georgia ballot not being counted. They need you to presume so
9 they can overcome their burden of proof to presume something
10 has happened or at least presume the risk is high, even though
11 no one has seen it and they know this. This is why the
12 testimony is we will never know one way or the other. They are
13 seeking to shift the burden improperly on the State to disprove
14 the negative.

15 And how do we know that there is no way to know
16 anyway? Because each of the plaintiffs will tell you, even
17 with a hand-marked paper ballot, they still don't know at the
18 time they entered that ballot into a scanner if it is counted
19 as cast.

20 And remember the exercise we all saw Dr. Halderman
21 hack it with a pen. Remember Dr. Gilbert used a pen too and
22 marked a sample ballot and showed how you invalidate an
23 affirmative vote and how you invalidate a nonvote. And it
24 didn't take a Ph.D. from Michigan and a hack-around thing with
25 malware perhaps posted on a device.

1 That is why no election is perfect. No State witness
2 knew of it either.

3 Now, here is another important one. There is no
4 quantification of risk. They say, well, Dr. Halderman says you
5 can't quantify risk. Well, that is why it is a policy
6 argument, Your Honor. In a medical malpractice case, there are
7 experts who will quantify the risk that something would have
8 happened but for the misdiagnosis. You see that in tort cases
9 I'm sure all the time.

10 Here when they point out there is no way a
11 quantification of the risk, what we're told is, well, the
12 malware could be there and we would never know it and then it
13 would delete itself so we could never find it. That is not an
14 appropriate burden of proof to try to impose on the State when
15 the State is the defendant, to begin with.

16 So then what do we hear from the plaintiffs on this?
17 Well, Gabriel Sterling said the State is not prepared for an
18 election. The Court will remember. I said yesterday this
19 would happen. I asked Mr. Sterling right after that:

20 Question: When you said the State would not be
21 prepared -- because he had been talking about EMPs with
22 Mr. Brown -- what were you envisioning?

23 Answer: A wild scenario that would never happen in
24 real life. Only a few things, major catastrophe, nuclear
25 attack, terrorist attack. Any series of those things that

1 could shut everything down at one time.

2 This is what is happening in the Court. Now we heard
3 a new theory that they somehow, because the Poll Pad checks
4 individuals through cellular-based information, that you can
5 now insert the card in the Poll Pad and take the Poll Pad card
6 to the computer or the BMD and there is a virus on it and
7 you'll never see it or never know it and it is going to change
8 someone's vote, even though no one has ever seen that happen in
9 the United States. The other problem is there is no expert
10 testimony on how that would happen or where it would happen.
11 But remember the testimony you did hear.

12 The only way it could change a ballot that is counted
13 as cast is because the ballots are built to the specific
14 election. There is a window of time that that happens. And
15 one would have to have access the ballot file.

16 Is it possible --

17 THE COURT: You need to get closer.

18 MR. BELINFANTE: Is it possible? Yes.

19 But so is the things identified by Mr. Sterling:
20 Nuclear attack, terrorist attack, EMPs. We're not saying it is
21 not possible. But the reason they won't quantify the risk for
22 you is because they can't.

23 And I'm not saying and the State is not saying that
24 that doesn't mean their concerns aren't valid. What it means
25 is that their concerns should be raised in a different branch

1 of government.

2 We spent a lot of time talking about the CISA
3 recommendations and the adoption or its focus on
4 Dr. Halderman's June report from 2021. But unlike the
5 plaintiffs, you heard testimony from both Elections Director
6 Evans and COO and CFO Gabe Sterling, that when the State makes
7 election policy it has to look at things other than just
8 cybersecurity. And you heard that from the plaintiffs as well.

9 Physical security, ease of administration, how do you
10 train people on something like this? Access and accessibility.
11 Popularity and how Georgians choose to vote one way or the
12 other. Budget. There is a broad range of things the State
13 concerns, not just cybersecurity concerns. And this is where
14 the *Anderson* case becomes relevant.

15 What Judge Brown wrote there was that the Court could
16 not strip State officials of their constitutionally enshrined
17 authority over elections and reassign that authority to an
18 academic instead, 467 F. Supp. 3d 1300 at 1331. And that does
19 not mean that Dr. Halderman's concerns should be attacked, and
20 it does not mean that the State is doing so.

21 But what it means is the State has to consider more
22 than what one of -- someone who has dedicated their lives to
23 trying to prove the vulnerability of machines says.

24 As Gabe Sterling told you yesterday, you could have
25 the safest machine in the world, but if no one could use it or

1 vote on it, it doesn't do any good.

2 So let's look at CISA and their recommendations. The
3 first one was to ensure that all affected devices are
4 physically protected during and after voting.

5 Actually I think the slides got mixed up, Your Honor.

6 The first one we spent a lot of time on. And it was
7 to contact Dominion Voting Systems to determine which software
8 and/or firmware updates need to be applied.

9 And the State was very transparent on this. Director
10 Evans, as well as Mr. Sterling, told this Court what they told
11 the Georgia State Senate in November of last year. It cannot
12 update to 5.17 now. Georgia law requires -- and there is
13 discussion in the Senate about changing this -- that updates to
14 software need to be EAC certified.

15 And by the time that the 5.17 was ready to go,
16 Georgia could not do it. It did test a pilot, as Director
17 Evans indicated in his testimony. But as Mr. Miller will tell
18 you, even if the State had done what CISA requested or
19 recommended -- and, again, it is just a recommendation -- their
20 own experts say it is not good enough.

21 So then we looked at VVSG 2, which no system in the
22 United States is running on VVSG 2. But we spent a lot of time
23 talking about it. In terms of the affected devices and whether
24 they are protected before, during, and after voting, this is
25 one where I think the Court probably was most either frustrated

1 or just tired with me. This is where we walked through every
2 time the word sealed appeared in the poll worker manual.

3 And remember this poll worker manual was from May of
4 2021, well before the CISA report. And that is why the
5 language of the CISA report says, CISA recommends election
6 officials continue to take and further enhance defense
7 mechanisms to reduce the risk of exploitation. And
8 specifically for each election, election official should -- and
9 it identifies -- continue to take. Georgia has been doing
10 this.

11 And Your Honor's summary judgment order said there
12 was no evidence we had. That is the fault of counsel. I will
13 stand before the Court and say, if we did not convey that to
14 the Court, that is on us. The testimony you heard is that the
15 State is doing it.

16 They also brought in Homeland Security, as Director
17 Evans talked about, to go and do checks of the physical
18 security of voting machines across the State. Yes, they were
19 questioned, was it good enough? We don't know. Why don't we
20 know? Because the plaintiffs didn't offer any expert on
21 whether it was good enough or not. They just attacked them and
22 said, well, we thought you should do more.

23 The next one. Ensure compliance with chain of
24 custody procedures through the election cycle. We walked
25 through the poll worker manual that does just that. There is a

1 form. It is administered by the county. So even if the
2 plaintiffs had problems with the chain of custody and the
3 compliance, they should have brought counties into the lawsuit.
4 They sued the wrong party.

5 And Gabe Sterling testified and told you -- I'm sorry
6 the cite is not there. It just wasn't prepared at the time we
7 were able -- that they have enhanced their chain of custody
8 requirements at the State.

9 Next, ensure that ImageCast are not connected to
10 external networks. Notice it says, ImageCast and the EMS.
11 What did they talk about today in a manner to distract? The
12 Poll Pads. It is not the same.

13 But in addition to that, it is addressed in a State
14 Election Board rule. And who is to enforce that? The
15 counties. Now, does that mean the State does nothing? No.

16 As Matt Mashburn told you, as Rebecca Sullivan told
17 you, as Ryan Germany told you, and Gabe Sterling and Blake
18 Evans, if counties don't follow SEB rules, they can be brought
19 before the SEB. The plaintiffs spent plenty of time going to
20 SEB meetings and bringing things to the SEB and the SEB
21 disagrees with their policy almost every time. They don't file
22 complaints, that I have seen, or that they have brought to the
23 Court in evidence and said we found a county that wasn't doing
24 this.

25 They could have. Maybe they did. But I didn't see

1 it in evidence in the Court.

2 Next, ensure that the security devices have things on
3 them. Examples, locks, seals, et cetera. Again, obligation of
4 the counties. The State trains on how to do it. It is in the
5 manual.

6 And so what did we hear? That there is all this
7 evidence of emails coming into the State saying this didn't
8 happen. One incident or maybe two, since 2020. Temple
9 Emanu-El down the street in Dunwoody from me. And the other
10 one that where you heard today, well, Michael Barnes said just
11 put another one on it. That was in the first general election
12 that the machines were used.

13 And this is exactly like *Fair Fight*, Your Honor. If
14 they wanted -- if the problem were systemic, if the risk were
15 to be quantified as tremendous and as bad as they say it is,
16 they certainly would have found more evidence of it. They put
17 two emails before the Court on problems with the seals at
18 trial.

19 There is another one. Close the background
20 application. Your Honor, I apologize that the answer is not
21 there. It is also in Defendants' Exhibit 1245, the poll worker
22 manual. And it talks about booting up. That is where the
23 information is. And one program going at the time.

24 Again, what is the significance of the poll worker
25 manual? It shows action taken before the CISA report. And the

1 argument advanced for the first time today that the poll worker
2 manual shows that the State is responsible for the
3 vulnerabilities that are impacted or decided at the county
4 level is simply wrong.

5 This is the same argument the plaintiffs advanced in
6 *Fair Fight* and lost. Why? They have not shown any causation
7 because they didn't call any county officials. They didn't
8 call any poll workers. They didn't call the person identified
9 in the two emails they have and say, did you see that the seals
10 were on there and that was a fault of training? Were you not
11 trained because of that? They didn't put any evidence before
12 the Court. In fact, they didn't even call the person who wrote
13 it.

14 So the evidence is admitted not for the truth of the
15 matter asserted. The Court can't even say that what the person
16 was saying is true.

17 But you did hear from Joseph Kirk who said his
18 training was effective. And here are the things that should be
19 done and here is what is done. Is Mr. Kirk one of the best?
20 Yes. They put up the picture with Secretary Raffensperger to
21 try to suggest or imply that he got an award the day before his
22 testimony. That was planned long ago. No one disputes that
23 Joseph Kirk is one of the finest public servants in the State
24 of Georgia.

25 Next, use read-only media to update and install

1 files. You heard Michael Barnes say, we have gone to CD burn.
2 It is burn once, read several, I think, was the phrase. I'm
3 the last person that should be talking about that. I hear CDs
4 and I think of things that I still have that can be played in
5 my car.

6 The next one is use separate and unique passcodes for
7 poll worker cards. This is where it was asked of Mr. Evans,
8 did you know that you could go on Google and figure out how to
9 prevent or do these counterfeit worker cards? Mr. Evans
10 surprisingly had not checked to see if you could do that. But
11 what he did tell you is that there are ways to prevent double
12 voting. We walked through and explained if someone had a
13 counterfeit card why that wouldn't work.

14 He also explained there were concerns with unique
15 tabulator security keys. And this is another part of the CISA
16 that the State has admittedly not adopted. The plaintiffs, who
17 spend a ton of time criticizing Dominion, said, well, Dominion
18 said you have to do it and you didn't do it. You must not be
19 taking security seriously. It is not what Blake Evans said.
20 It is not what Michael Barnes said. It is not what Gabriel
21 Sterling said.

22 This is the problem when your sole focus is
23 cybersecurity as a plaintiff, but the State has to look at
24 other things. And what did they tell you was the reason? That
25 if there are several passwords for every different poll worker

1 to use, something is going to go wrong. Someone is going to
2 forget it. Someone is going to do it. Then what happens? We
3 have lines.

4 Director Evans told you that one of the policies of
5 the State is to avoid lines. And I know the Court remembers
6 the general primary from 2020 and in Fulton County during, in
7 particular, to a lesser extent the general election of 2020.
8 Those are concerns that the State doesn't have the luxury to
9 ignore.

10 Next, make sure they are subject to pre and post
11 rigorous testing. Again, SEB rule imposes that on the
12 counties. They put an email in front of Director Evans,
13 Plaintiffs' Exhibit 606, where he says, please, please, please
14 make sure these counties get this done on this L&A testing.
15 That was before the November 2020 general election.

16 They didn't ask him if it was done. They didn't put
17 any evidence up that it wasn't done. But, Your Honor, again,
18 as Mr. Miller will tell you, it wouldn't matter. Their own
19 experts say L&A doesn't matter unless you are using hand-marked
20 paper ballots.

21 But what it shows is that the State is taking it
22 seriously. The State is doing what it can. And the only email
23 they have is one from 2020 right before the general election.
24 They have not met their burden.

25 This is the tabulator unifier -- unify tabulator

1 security key, which was what I just talked about and just
2 blended together. And here's the quote from Mr. Evans.
3 Because he was asked Dominion says you have to do this and
4 you're not doing it. He says, well, we have to look at the
5 environment that we're operating in and then mitigate risks --
6 all the risks involved as best we can.

7 Number 11, as recommended by Dominion Voting Systems
8 supplemental -- and use supplemental method to encourage hashes
9 on the applications, audit log exports, excuse me, and
10 application reports. Michael Barnes testified about the hash
11 testing that is there.

12 And, again, here the argument from the plaintiffs is
13 hash testing doesn't work if there is double secret malware
14 involved and you can't find it and it doesn't work if it has
15 been compromised. But their own experts tell you it doesn't
16 matter as long as there is a BMD. Mr. Miller will get to that
17 as well.

18 Again, Your Honor, it is not minimizing the
19 arguments. But it is showing why this forum is the
20 inappropriate place to have them because this is not a
21 constitutional violation.

22 And what the evidence has shown is that the State is
23 doing -- taking reasonable steps. And if the machines were so
24 unconstitutional, we know two things would have happened. They
25 would have had evidence of one changing a vote or they wouldn't

1 say it is okay for the disabled to use them, just not others.

2 Number 12, encourage voters to verify human readable
3 votes on a printout. This is where they had experts saying
4 nobody reads their ballots. They have not argued,
5 interestingly enough, that having to verify your ballot is a
6 burden on voting; or if they have, I have missed it.

7 But this part is what is the State doing about it?
8 Counties are obligated. There's rules about having both
9 signage and someone there to tell you to check your vote. Kirk
10 says he does it, the only election administrator. The UGA
11 study says 80 percent do it while they are at the voting booth,
12 which is a short distance from the scanner.

13 THE COURT: But there is a time limit too; right?

14 MR. BELINFANTE: There was a time limit, Your Honor.

15 THE COURT: Five seconds.

16 MR. BELINFANTE: But there is no one quantifying if
17 that is inappropriate or not.

18 THE COURT: I'm just sort of --

19 MR. BELINFANTE: Sure. Sure.

20 THE COURT: I'm trying to -- let's be straight about
21 that too. But I'm not trying to make a judgment on it. I'm
22 just saying --

23 MR. BELINFANTE: Understood.

24 But, again, that falls back to why is it the fault of
25 a machine and how does that render a machine unconstitutional

1 for a voter? Because remember the injury, to know their vote
2 was counted as cast.

3 Mr. Schoenberg at least was honest about it and
4 throughout his whole testimony -- I'm not implying he was not
5 honest. That didn't come out right.

6 You remember I asked Mr. Schoenberg, why didn't you
7 read the ballot if voting was so important to you? And he was
8 honest about it. Well, I don't think the machine is going to
9 count it the right way anyway, so it wouldn't matter.

10 Your Honor, the testimony you heard from voters,
11 those that were voting on the machines, nobody prevented them
12 from reading their ballot. Nobody -- they are allowed to bring
13 sample ballots in. In fact, the rule is you're supposed to
14 have sample ballots at the thing -- at the polling place. If
15 they don't, then that is a claim against the counties. It is
16 not a claim against the State to bring a claim against the
17 county through the SEB.

18 Moving on, conducting rigorous post election
19 tabulation audits. I'm going to let Mr. Miller carry the
20 weight on most of this one. But you can see through the laws
21 of what is there. Director Evans talked about the audits that
22 are performed. Dr. Adida talked about the audits that are
23 performed and I believe said Georgia was among maybe three
24 states that conduct these type of audits.

25 And while the plaintiffs at one level criticize the

1 audits and say they are ineffective, at the next, as Mr. Miller
2 will point out, say it doesn't matter because it is not a
3 hand-marked paper ballot.

4 That is the paper that we went and discussed with
5 Ms. Marks in her examination when they said the audits on a BMD
6 just don't matter, among others who said the same.

7 So what is, again, the burden, looking at this
8 through audits? Now, this is where it gets interesting.
9 Remember they have told you they are not challenging election
10 results. Yet they are claiming an injury to their risk of harm
11 or their risk because the election itself isn't audited. Not
12 that their own individual ballot isn't audited. But the
13 election itself. That doesn't speak to whether their vote was
14 accurately counted as cast. That speaks to election result.

15 Here, it shows why again it wouldn't matter. The
16 Coalition told you the machines are inherently unauditable.
17 Dr. Stark told you that they are unauditable. The plaintiffs
18 say that even if that is true, the disabled community should be
19 able to use them. And Dr. Adida talked about the contrary and
20 so did director -- or excuse me, Director Kirk, who is the only
21 election administrator who has actually testified from the
22 county level.

23 It is about hand-marked paper ballots. It is not
24 about a risk of a vote being counted as cast.

25 So then let's look at the burden on voting again,

1 shifting now to if we are not looking at statute, what is the
2 Secretary's actions that are being challenged. We have a few
3 emails, 608, 607, 609, and generally not after 2021.

4 We have Director Evans' testimony explaining each of
5 those. That was Temple Emanu-El. The other person from
6 North Georgia who said that the ballot came out with only the
7 QR code on it. And Director Evans testified he never saw that
8 again -- happen again and immediately asked Dominion. And
9 remember all of these things are happening within hours of the
10 emails coming in. Maybe a day at the most. You can't argue
11 the State isn't responsive.

12 Here is an interesting one. Spalding County. Spent
13 a fair amount of time on Spalding County. In Spalding County,
14 the county attorney contacted the State and said someone is
15 coming to try to image the system. And you saw the email
16 exchanges, that is illegal. Don't do that.

17 Then we understood that there may have been an
18 attempt, and the State went and got it because the State had
19 all the information.

20 You heard about Ware County. Mr. Sterling was
21 testifying about that. Mr. Cross asked him on examination,
22 well, in Ware County something was supposed to happen. And
23 Mr. Sterling testified that there were calls placed down. And
24 remember this was November, December of 2020 when a bunch of
25 disinformation was coming in about what was happening in

1 Georgia elections.

2 Mr. Sterling said it was resolved with a phone call.
3 So then we get more of the same. Well, did you open an
4 investigation into it? No, because it was resolved. And at
5 the time, that is what happened.

6 Then we heard Butts County, but we never saw anything
7 with it.

8 THE COURT: Let's go back to Spalding County for a
9 second.

10 MR. BELINFANTE: Yes, Your Honor.

11 THE COURT: What did it mean when you said after
12 Spalding County, that you said the county attorney contacted
13 the State and said someone is coming to try to image the system
14 and you saw the email exchanges, that is illegal. Don't do
15 that?

16 This is the sentence I'm asking you about. Then we
17 understood that there may have been an attempt -- the State --
18 and went and got it -- I think you are saying the State went
19 and got it because the State had all the information.

20 MR. BELINFANTE: They picked up the server because
21 there was -- there was a potential thought that somebody -- and
22 it was never demonstrated, you know. There were concerns about
23 what was there. So they went down, picked it up, and put new
24 ones there. They resolved it.

25 THE COURT: Did they examine it?

1 MR. BELINFANTE: I'm sorry?

2 THE COURT: Did they examine it? I didn't think
3 the --

4 MR. BELINFANTE: I mean, certainly there is no
5 evidence in the trial that there was anything on the Spalding
6 server. And Lord knows we had enough discovery disputes that
7 I'm sure if the plaintiffs wanted to do that they would have
8 told you.

9 THE COURT: All right. Go ahead.

10 MR. BELINFANTE: So then we get to Coffee County. We
11 had three separate investigations. And you'll recall when
12 Michael Barnes was on the stand. This is where kind of we
13 spent so much time with it and thought of it. The State always
14 viewed this at the Secretary's office as three separate
15 investigations.

16 The first was the failure to certify the elections.
17 The letter went, I believe, to the State on December 5. And
18 the State responded on December 9. They certified their
19 elections.

20 But at that point, the next one was a YouTube
21 disclosure of the password. This is the Post-it note on the
22 computer. Ryan Germany testified that they opened up an
23 investigation. They went down. But by that time Misty
24 Hampton, who was the elections deputy I believe at the time,
25 had resigned or had been terminated. And so they do -- they

1 deemed that largely resolved because it was an individual
2 person.

3 The SullivanStrickler breach that happens in January
4 the State does not learn about until February when we hear the
5 tape sprung on Gabe Sterling during his deposition, which was
6 recorded on March 7, 2021, almost an entire year before.

7 And there has been so much criticism levied by
8 plaintiffs against the State for not knowing SullivanStrickler.

9 But let's look at what the evidence was. It was the
10 Cyber Ninja card from Doug Logan that the new director in
11 Coffee County saw, contacted Chris Harvey, Chris Harvey said,
12 as Russ Willard did -- and you heard that from the *Pearson*
13 thing -- it would not be good. It would be the keys to the
14 kingdom. It would be bad -- no one is disputing that -- if a
15 third party were able to come in and image the software or the
16 hardware.

17 There was a Dominion release that came out at that
18 time. But there was also -- and the plaintiffs put it into
19 evidence -- the *Pearson* evidentiary hearing before
20 Judge Batten, which the witnesses testified they knew about.
21 Everyone knew about the *Pearson* case. It was not a secret. As
22 much as they spent time criticizing the investigation, they
23 didn't offer any expert testimony on whether it was a good
24 investigation or not. They didn't call any other police
25 individuals. They didn't call any investigators at all.

1 THE COURT: What investigation?

2 MR. BELINFANTE: The investigation of Joshua
3 Blanchard going down, meeting with Misty Hampton. Their
4 argument was he should have recognized the person coming out of
5 the office. He said he presumed that because he was there that
6 he was there with the permission of Misty Hampton.

7 I mean, in plaintiffs' world they were supposed to
8 presume that the county officials were doing exactly what we
9 now know only in hindsight that they were. We have no idea
10 whether there was sufficient investigation or not under the
11 circumstances. We only heard the testimony of Mr. Blanchard.

12 So what the State had was the Cyber Ninja card, the
13 Dominion release, and that someone walked out the door.
14 Plaintiffs had more.

15 Mr. Montgomery, do you want to play what plaintiffs
16 had?

17 **(The audiotaped recording was played.)**

18 MR. BELINFANTE: March 7, 2021, that was Scott Hall
19 and Ms. Marks on the phone. The State did not hear that until
20 February of 2022. Yet you heard from Director Evans, you heard
21 from director -- former Director Harvey, you heard from Joshua
22 Blanchard, had they heard that, it would have opened things
23 more than simply seeing the Cyber Ninja card and the Dominion
24 release.

25 In hindsight, does it look like perhaps there should

1 have been more done? Yes. But that is why we don't judge the
2 constitutionality of something with such a limited picture.

3 But here is the problem, Your Honor. If the
4 plaintiffs -- remember also what Ms. Marks told you, that she
5 didn't think Scott Hall was credible so she didn't believe him.
6 She told -- and so -- but she thinks the State should have
7 believed it was the gospel the minute it happened. And that is
8 her criticism and the plaintiffs' criticism throughout this
9 whole time.

10 THE COURT: I don't think that is a fair
11 characterization. But that's -- go ahead. The last thing you
12 said. But that is fine. That --

13 MR. BELINFANTE: That was the AJC reporting of her
14 quote, which she acknowledged. That's where I'm getting it. I
15 understand the Court may disagree with me on that. I didn't
16 want the Court to think I was making it up.

17 So when Mr. Cross put up his puzzle on slide roughly
18 86 and said, look at all the State knows, it left -- it is
19 presuming that because of those things, they are supposed to
20 know that a county election official is going to break the law
21 with the county party head at the time, a former county
22 election board member who had to resign because he wouldn't
23 certify an election that Secretary Raffensperger won.

24 All of these people are having communications with
25 Ms. Marks at the time. I'm not implying or suggesting they

1 told her it happened, but they were -- they were the ones
2 talking, not the State.

3 And so if Coffee County is being used as evidence
4 that the machine in front of you is unconstitutional, these are
5 the wrong plaintiffs to make that argument.

6 But here is the other thing. Like everything else in
7 this case, remember the testimony of Dr. Halderman that the
8 information that they got at Coffee County was already on the
9 web anyway. He had already testified to that. And remember
10 the slide that they showed you of how you have the EMS going
11 down to a central piece there, going down to the BMD, all the
12 arrows went down.

13 So the evidence in order for Coffee County to be
14 significant, you still have the physical security problem. You
15 have to be able to put the -- if it is going to spread, you
16 would have to put the USB in an infected BMD, take that, put it
17 into the county one, which is still isolated, and then take
18 that to a county somewhere else.

19 So Mr. Cross asked a witness -- you may remember
20 this -- well, it will only take ten votes on 3,000 machines or
21 whatnot. But that gets back in terms of quantifying the risk.
22 Remember you would have to have the ballot build or the ballot
23 file for each one and find it at a particular time, insert it
24 with that many county employees, poll workers, voters thinking
25 nothing of it. And even then, that doesn't address the

1 plaintiffs' issue of not knowing if their vote was counted as
2 cast because their alternative does the same thing.

3 It brings us to causation. Here under 1983, unlike
4 standing, they have to show proximate cause, that the State is
5 the proximate cause of what they are alleging are the
6 unconstitutionality of the machines.

7 They have not shown that. They cite for you the very
8 case we said don't cite in the middle of trial. The *Carnival*
9 *Corporation*, the Court was correct in citing it for standing
10 purposes because traceability and causation are different
11 things. Traceability is easy -- easier.

12 Causation requires proximate cause. That is why the
13 Anderson-Burdick test says you have to see what policy or rule
14 of the State is imposing something that is violating their
15 rights and they have not shown anything from the State that
16 does it other than the existence of the BMDs themselves.

17 Intervening criminal conduct that severs the causal
18 chain. They have put up posters of you and shown you that
19 people, including the gentleman on the phone, who have either
20 pled guilty or been indicted. That breaks the causal chain for
21 the State. And why? Because what happens when the State has
22 the information? That is what the other examples tell us.

23 Independent of that, independent acts or an action of
24 counties, also sever the claim. If the concern is physical
25 security and that is a county obligation, which it is -- and

1 there is no argument that the training has been insufficient
2 because there has been no testimony from someone linking any
3 problem at Coffee County to training -- then that breaks the
4 causal chain. And that ends their constitutional argument.

5 So then they say, well, the government is not -- the
6 State is just not doing enough or they are just inept. All of
7 the case law in this area says that State inaction is not a
8 basis of 1983 liability.

9 Now, I have compare here at the bottom because it was
10 cited as part of the argument there, albeit at summary judgment
11 when the presumptions flow in the plaintiffs' favor. When this
12 case was up in 2019 to the Eleventh Circuit, it was addressing
13 the *ex parte Young* doctrine, which is not the same standard
14 that is going to apply when looking at liability. That looks
15 to jurisdiction.

16 The cases cited above where it is *Fair Fight*, *Smith*,
17 or *DeShaney* talk about how government inaction is not a basis
18 of liability. And we're not saying that the government was
19 inactive. We're saying, even if the plaintiffs convince the
20 Court otherwise, that it is not a basis of liability.

21 But I think we've shown the State went down, took the
22 server out before it even knew of the call from Coffee County.

23 So then what is the State rule? Now we hear for the
24 first time that the State is not following its own law. The
25 Court has already dismissed a claim similar to that. It is

1 Footnote 74 in its summary judgment order. That was the
2 Coalition's argument. And if that is where they are limiting
3 their argument, the plaintiffs, it can be dismissed at that
4 point.

5 This is again, what is the State law being
6 challenged? The State law being challenged is the uniformity
7 requirement that all in-person voting, which is what 95 percent
8 or 91 percent of Georgians do, is unconstitutional based on
9 something that has never been demonstrated, unlike what we saw
10 with the hand-marked paper ballot.

11 They say it is not a facial challenge. But it is
12 because they tell you repeatedly that it is the machine that
13 can't be audited. And the security piece is just a side of
14 that. Remember BMDs is their position cannot be audited.

15 But here is another problem with that. Even if
16 Coffee County were somehow, you know, such significant
17 evidence -- and it is a real problem. Please understand we're
18 not saying it is not. But in terms of establishing liability,
19 sporadic incidents do not represent policy. Four emails about
20 problems with BMDs that have been introduced into evidence do
21 not represent State policy.

22 That was litigated in *Fair Fight*. And Judge Jones
23 was right that the *Gamza* binding precedent says exactly that.

24 Here is another place. We really disagree with
25 plaintiffs. They told you --

1 THE COURT: We really, really.

2 MR. BELINFANTE: I strenuously object.

3 THE COURT: For any of us who have had children, I'm
4 really, really, really, really mad.

5 MR. BELINFANTE: I'm not suggesting that you have
6 thought that on some of our calls together. And I mean all of
7 us.

8 THE COURT: I meant collectively, of course.

9 I'm really, really, really sick of this discussion.

10 MR. BELINFANTE: You've heard a lot from me in the
11 past three days. I don't blame you.

12 THE COURT: Not of this discussion.

13 MR. BELINFANTE: All right.

14 Your Honor, this is one -- again part of the reason
15 the State kept pressing on what are the remedies the plaintiffs
16 are seeking is because it is part of their case. What
17 Judge Jones found in -- in the *Fair Fight* case, citing the
18 *Nipper* decision from the Eleventh Circuit in 1994, and
19 importantly not limiting it but applying it to the
20 Anderson-Burdick conduct or the Anderson-Burdick claims, it
21 precludes liability under the totality of the circumstances.
22 And that makes sense.

23 If you are weighing the injury and the magnitude and
24 severity of the injury against the State's interest, you kind
25 of have to see where it is going. If the injury is that I

1 can't -- you see where I'm going, Your Honor.

2 THE COURT: I do.

3 MR. BELINFANTE: You do. So that is where --

4 THE COURT: I really, really do.

5 MR. BELINFANTE: Mr. Miller will talk about remedies
6 more specifically. But that is part of their claim.

7 So again, we look at the State interest. In the
8 existing system, you heard about uniformity, ease of
9 administration from both Director Evans and Gabe Sterling. You
10 heard about the preference for our current audit system and the
11 benefit of having county partners as opposed to full top-down
12 from Gabriel Sterling.

13 Then you heard Matt Mashburn just answer a tremendous
14 amount of questions about what is the State's policy or benefit
15 of the current matters.

16 The State has an interest in the current system. It
17 believes -- and you have heard testimony -- that it is more
18 secure than hand-marked paper ballots. It doesn't have to be,
19 you know, infinitely more secure. Again, remember what
20 Dr. Gilbert did with his hand-marked paper ballot. And Gabe
21 Sterling couldn't tell you which was right and which was wrong.
22 And that didn't -- that took a pen. And that didn't take a
23 tremendous amount of work.

24 And so from where the State is, there are provisions
25 here, including the QR codes, which make the retabulation,

1 which is different from the audits -- but the retabulation
2 easier.

3 So then the last slide from me, Your Honor, in
4 looking at the State's interest, there was literally zero
5 evidence on whether an election administrator could do this
6 from the plaintiffs. Instead, you heard Mr. Kirk say that
7 having both hand-marked paper ballots there as they -- the
8 equal or means of in-person voting would be problematic. I
9 think he described it more strongly than that.

10 You heard no county official talk about it. You
11 heard no poll worker talk about it. You almost never even
12 heard of someone in terms of their experts who vote in Georgia
13 and the use of the actual BMD machines.

14 And so at the end of the day, plaintiffs may be -- I
15 have no doubt and the State has no doubt that plaintiffs feel
16 very strongly about their doubts of the BMD system. And I know
17 the Court has ruled that it is not a bullet shot defense or
18 bulletproof defense that hand-marked paper ballots are there as
19 an alternative.

20 But this is, again, where looking at the remedy
21 matters. Because if the Court were to enjoin the use of the
22 BMDs, that leaves only the hand-marked paper ballot. And that
23 is the only evidence before the Court anyway. And it would be
24 one thing if the plaintiffs told you, I have absolute
25 confidence that when my hand-marked paper ballot goes in that

1 scanner I know it is being counted correctly. But they didn't.
2 They were candid. They were honest. You can't.

3 Because anytime, as they will tell you, a machine is
4 involved, you just don't know but the only way to protect
5 privacy to have the machine there as opposed to filling in a
6 glass jar. That is why the inherent risk that they tell you of
7 the machines does not make -- and we're not saying there is
8 inherent risk. They're describing inherent risk -- does not
9 make the BMDs, which are used in Georgia and South Carolina and
10 parts of -- and BMDs generally, because that is what is there.
11 Tennessee, Los Angeles, Orange County I think we heard about --
12 they are made available across the country.

13 But at the end of the day, even if the plaintiffs
14 were right, that the BMDs are so risky that they are
15 unconstitutional, you can't then say, but you have to have them
16 available for the disabled community as HAVA requires. That is
17 what would violate Anderson-Burdick. Not the use of the
18 machines.

19 With that, Mr. Miller will finish out and will be
20 talking shorter than me, as usual, Your Honor.

21 THE COURT: Thank you.

22 Before he begins, because I think we also have
23 some -- we're going to have a rebuttal, I'm going to use the
24 facilities for a few minutes.

25 So if anyone else wants to right beforehand and then

1 we'll resume with you.

2 (A brief break was taken at 3:20 PM.)

3 CLOSING ARGUMENT

4 MR. MILLER: Thank you, Your Honor. I want to begin
5 by pointing out what Mr. Belinfante and Mr. Tyson mentioned.
6 This has been an extremely difficult case for a number of
7 reasons. But I am very honored for the way that Your Honor has
8 handled it, to allow us to get through it, to be able to
9 practice here in this Court.

10 And it continues to give me pride to represent the
11 folks in the Secretary of State's office and on our State
12 Election Board. Because, Your Honor, it is -- I think one of
13 the others left off with the term war. And it got like that
14 for a little while. But we've gotten through trial. We're
15 here on the evidence now.

16 And, Your Honor, as Mr. Tyson and Belinfante pointed
17 out, plaintiffs' claims fail both for lack of standing and on
18 the merits. But if this Court moves beyond those failures, we
19 get to the same problem that Judge Jones pointed out in the
20 *Fair Fight* case.

21 It is a necessity to be able to demonstrate an
22 administrable remedy whether Anderson-Burdick or as part of the
23 traditional preliminary injunction factors -- or excuse me,
24 permanent injunction factors.

25 So, Your Honor, I know the Court is well familiar

1 with it. But, of course, the plaintiffs must not only
2 demonstrate an irreparable injury, absent the issuance of an
3 injunction, but the lack of an adequate remedy at law. They
4 must demonstrate that the balance of the equities weighs in
5 their favor. And they must also demonstrate that the public
6 interest would not be disserved by a permanent injunction.

7 Your Honor, we spent a lot of time in this four-week
8 trial trying to pin down what the remedy was here. Of course,
9 the Court was very clear prior to trial about what it viewed it
10 could and could not order, what it could and could not look at.

11 And so let's start with who was challenging what so
12 that we can place together what the potential remedies will be
13 relative to these pieces of the in-person voting election
14 equipment.

15 The Coalition and the Curling plaintiffs, of course,
16 both challenging the ballot-marking devices themselves,
17 potentially maybe the ballots themselves, the paper themselves
18 due to QR code -- but, Your Honor, one thing that is noticeably
19 missing from the stand here is the scanner. Now, I believe
20 Mr. Davis to his credit is challenging all of the above.

21 But I must also show what is not either on this table
22 nor on this TV but that we have talked about throughout the
23 course of this case but for which no evidence was presented at
24 trial. And plaintiffs have abandoned their claims regarding
25 these issues to the extent they were there in the first place

1 and no injunction is warranted on these matters.

2 Your Honor heard nothing about the voter registration
3 database. Your Honor heard nothing on the Poll Pads other than
4 somebody watched Netflix on them. Your Honor heard nothing on
5 the EMS servers themselves. Your Honor heard no evidence
6 whatsoever that any supposed malicious code had, in fact --
7 well, first of all, had been present on the old DRE GEMS
8 system, and then had, in fact, navigated its way into the
9 Dominion BMD system.

10 And this is in spite of the fulsome examination this
11 Court granted to the plaintiffs of the DRE memory cards, of the
12 GEMS databases, of the DRE components themselves, and of the
13 forensic image of the Kennesaw State server.

14 And Your Honor, of course, the State -- and we
15 actually fielded an inquiry from it from a former defendant
16 county in this case -- are still storing DREs.

17 Now, this matters with respect to the remedies
18 because any injunction must be narrowly tailored to remedy the
19 particular asserted constitutional violation. There is no such
20 thing as simply a suit for injunction. If the plaintiffs'
21 rights have not been violated, then they are not entitled to
22 relief, injunctive or otherwise.

23 The plaintiffs cannot determine their preferred
24 remedy and work backward from there to try and identify
25 something to get them there. It is not COVID that gets them to

1 their preferred remedy of hand-marked paper ballots. It is not
2 simply the fact that a computer exists presumably. They must
3 identify what it is that then causes what we are now hearing as
4 enjoining the uniformity requirement some injury that results
5 in an injunction that flows from that.

6 And it must be no broader than necessary to remedy
7 the constitutional violation. So as a result, it is not enough
8 for the plaintiffs to say that the illegal acts of Misty
9 Hampton and others in Coffee County occurred. It is separate
10 and apart from causation. They have got to show how that then
11 results in their entitlement to injunctive relief.

12 This is because nothing about enjoining the mandatory
13 use of the BMD system for in-person voters has any direct
14 relation to Coffee County whatsoever. There has been no
15 evidence of malware being found in Coffee County and no actual
16 election fraud or tampering being committed.

17 And that is not to say, to be clear, the State in no
18 way, shape, or form condones anything that occurred in relation
19 to it. But with respect to challenging 21-2-300 is a different
20 matter.

21 Of course throughout the progression of this case
22 prior to trial, we have known what the plaintiffs wanted. But
23 as I mentioned earlier, we narrowed things heading into trial.
24 This Court recognized that granting such sweeping relief as a
25 mandatory injunction for mandated use of hand-marked paper

1 ballots across the State was something that was beyond the
2 Court's direct authority.

3 But the Court did envision at summary judgment what
4 it called pragmatic sound remedial policy measures that could
5 be ordered or agreed upon by the parties. That is at the
6 summary judgment motion at five.

7 I'm sorry, the order at five.

8 Obviously, of course, the latter did not happen. We
9 have been here over the course of the month, having a lot of
10 fun with each other and litigating over this case. And given
11 that, the fact that we could not get there on sound remedial
12 policy measures, perhaps unsurprisingly the plaintiffs have
13 offered this Court no half measures.

14 Their own experts have told this Court that these
15 pragmatic sound policy measures that it envisioned will not
16 change their concerns and will change nothing about the
17 problems they see with the use of the Dominion ballot-marking
18 device system.

19 Now, with respect to these -- your contemplated
20 pragmatic measures, the Court in its mind thought about three
21 of them here: Providing for the use of printed ballots for
22 vote counting without the QR codes, expanding the scope of
23 election audits, and implementing other essential cybersecurity
24 measures and policies.

25 Your Honor, I'll take a minute to walk through all of

1 them and where the evidence landed to the extent it was there
2 at all.

3 Your Honor, with respect to eliminating the QR codes,
4 again, there is no testimony in the record that this will
5 remedy the alleged burden occurring. And plaintiffs' own
6 expert says he considers it an improvement but he can't
7 quantify the degree and he won't say that at that point he is
8 fine with it. That if it is a full-face ballot, if it looks
9 likes an absentee ballot, that there is no issue. He wouldn't
10 go that far.

11 Now, on the other hand, Mr. Sterling provided
12 unrebutted testimony on the issues involved here. New software
13 is required that the State cannot do right now. New printers
14 are required, given the length of the ballots and particularly
15 in multilingual jurisdictions. A 25 million-dollar total cost
16 imposed. And perhaps most crucially and which I'll get to in a
17 minute, the time required for implementation. This is not
18 something that flips on a switch.

19 As a consequence, the State's evidence showing the
20 opposite, that there is no substantial advantage to leaving the
21 QR code stands alone. Dr. Adida informed the Court in response
22 to plaintiffs' questioning that from a technical perspective
23 the QR code does not matter whatsoever.

24 THE COURT: Not from a technical matter. From his
25 auditing perspective.

1 MR. MILLER: Yes, Your Honor. He went to testify in
2 response to again plaintiffs eliciting testimony in their
3 cross-examination about the substance of viewing these ballots.
4 And that is also where Dr. Gilbert fits in, a nationally
5 recognized voting systems expert, a member of the NASEM
6 Committee that we have discussed so many times, and the only
7 human-computer interaction expert that testified in this case.

8 The power of one he said, he said back in 2021. Your
9 Honor heard about this Northampton, Pennsylvania. What
10 Northampton showed us -- in fact, just yesterday, Mr. Skoglund
11 came back for the rebuttal case, slash, Zoom conference and
12 confirmed the only one thing of significance, that the polls
13 opened at 7:00 A.M. and the voters reported the issue -- the
14 issue was reported back to the county at 7:15 A.M. on a
15 down-ballot, judicial retention race, that you've heard nobody
16 cares about, nobody looks at, because it is so burdensome to
17 read what you're voting for.

18 That's just simply not the case that has been borne
19 out not only by the expert testimony but what we have seen in
20 factual evidence elsewhere. Notably too, as Dr. Adida pointed
21 out, and Dr. Gilbert, you think not one of these stories if
22 this were occurring would have been reported in the 2020
23 presidential race as contentious as it was? 2022 governor's
24 race? There was none of that.

25 And, Your Honor, I can tell you that it stands in

1 stark contrast to, frankly, what we heard about the DREs. We
2 heard plenty about pristine ballots and bamboo fibers. But
3 there is not a single affiant in the *Kraken* case that we did
4 right across the hallway that came in there and said, my vote
5 flipped on my BMD.

6 There were relying on Dr. Halderman. They know about
7 his theories on it. Not a single one of them. Your Honor, how
8 about the broader scope and number of election audits? On that
9 front, once again, there are no half measures for these folks.
10 Dr. Halderman testified that there is no commercial BMD
11 available today that would produce ballots that would be
12 strongly auditable as a record of voters' intent.

13 Dr. Stark went a step further. Dr. Stark says there
14 is just simply no way you can audit an election in which a
15 substantial number of votes are cast using ballot-marking
16 devices. Of course, he made this opinion despite not having
17 reviewed any of these procedures and offered these tweaks to
18 audits about compliance auditing and change of custody and all
19 this sort of stuff. He didn't review a single bit of it. It
20 was attached to his declaration. He didn't look at it.

21 But let's be clear about where Georgia stands in
22 relation to audits. Georgia's one of only six states in the
23 entire country auditing statewide elections to confirm the
24 outcome. As Dr. Adida informed the Court, it was the second
25 state in the country to do so to carry out a statewide

1 risk-limiting audit.

2 And what the Court heard is that, well, you can't
3 base this on having one statewide audit. It doesn't help
4 anything. Well, again, the testimony that plaintiffs elicited
5 from Dr. Adida says that the risk of an audit substantially
6 changes the risk analysis of a hack on this whole QR code
7 verifiability issue. Just the fact that it could happen
8 because you would be caught. That is the whole thing we've
9 been talking about this whole time, undetectable malicious code
10 that will delete itself that you will never be able to find.

11 The Court also heard from Joseph Kirk in Bartow
12 County. And, Your Honor, Joseph Kirk was the only county
13 elections official to testify in this case. He did so over
14 plaintiffs' objection, and he told the Court about additional
15 audits he performs, how he reminds voters to check their
16 ballots. It came right after a series of questioning that the
17 State's elections director, objecting to hearsay and lack of
18 personal knowledge, because he is saying this is what State
19 Election Board rules require. Mr. Kirk comes in and says,
20 yeah, that is exactly what I do. Not only do I do that, I
21 think as Mr. Cross pointed out, he does this risk-limiting
22 audits on steroids. And he does it to build the confidence of
23 his community in the election system.

24 And he trains other county election officials,
25 informs them what he is doing, not only statewide level. He

1 trains them on both, how to conduct the statewide audit and,
2 hey, why don't you guys -- why don't I tell you guys about what
3 I'm doing in Bartow, above and beyond the minimum that is
4 required.

5 And the only thing that plaintiffs had to question
6 him on is the Secretary giving him an award. And as
7 Mr. Belinfante noted, of course, the Secretary is awarding who
8 is undoubtedly one of the shining stars of election
9 administration in the State, the folks that go above and
10 beyond. That doesn't show bias. That shows a Secretary of
11 State encouraging the locals to do what they need to be doing.

12 Your Honor, cybersecurity measures and policies.
13 You've heard the testimony. Software updates isn't feasible
14 for 2024. No plaintiff has examined the procedures required or
15 plaintiffs' expert has examined these procedures required by
16 Georgia law. These forms were produced to the plaintiffs back
17 in 2021.

18 Your Honor, instead of these sound pragmatic
19 reasonable policy measures, instead we're here talking about
20 enjoining the uniformity requirement, which Your Honor will
21 recall. As I pointed out at the summary judgment hearing, this
22 is -- this is a facial challenge. As much as plaintiffs want
23 to change it, there is no version of electronic ballot markers
24 to be utilized for in-person voting that is going to resolve
25 their injury concerns. Nonetheless, it is not injunctive

1 relief tailored to their purported injury to the extent that it
2 is alleged as an as-applied.

3 There is no evidence of what any county would do if
4 this is enjoined as a starting point. All of these counties
5 have Dominion voting equipment sitting in their office. They
6 have been trained on it. It is ready to go. The Court can
7 enjoin the State if they can carry their burden. The Court can
8 enjoin the State from enforcing 21-2-300. But the counties
9 have an independent legal obligation to supply their polling
10 places. Some of them may go to paper ballots. I don't know.
11 None of that testimony was elicited, much less that any of the
12 counties in which the plaintiffs vote in would do so.

13 It still wouldn't provide any means to verify
14 individual votes counted as cast, except that is now their
15 claim. We have a secret ballot system. Your Honor had a claim
16 about it in front of it. There is no system in which you can
17 maintain a secret ballot and have a voter be able to go look up
18 their ballot and see on the MVP page, that, oh, yeah, that is
19 exactly who I voted for.

20 The only county election official to testify
21 described offering both is the worst of both worlds. The only
22 county election official to testify discussed these
23 infrastructure and cost demands. Not only that, it overrides
24 the State policy decision that has been in place for 20-plus
25 years and voters that just haven't voted a hand-marked paper

1 ballot in Georgia since 2001.

2 Your Honor, it also doesn't resolve the issues that
3 you were dealing with here. It is just a different kind of
4 vulnerability. Two different kinds of vulnerability. One,
5 that it is subject to fear mongering because it is electronic.
6 Another, that it is subject to conspiracies because somebody
7 can toss the boxes of ballots in the river or go mark them in
8 the back end.

9 None of that makes either unacceptable or
10 unconstitutional. It is simply a policy decision. And it does
11 nothing to talk to the administrative and financial burden
12 imposed on nonparty counties. This Court can't -- the Court
13 could enjoin us and enjoin my clients from enforcing 21-2-300.
14 The Court cannot blue pencil the statute to require that the
15 Secretary of State provide this equipment, provide this new
16 choice that completely overrides the legislature's decision.

17 Your Honor, other remedies -- I'll be honest. It is
18 at least cleared up to some extent now. We've now gotten --
19 after four weeks of trial, we've got to closing argument to
20 finally hear that, oh, we're back to square one. We want your
21 2019 order, just do it again.

22 But let's go back to the logical premise of what
23 plaintiffs are seeking. It is based upon the idea that the
24 BMDs themselves, the votes cast upon them, are intrinsically
25 unknown, inherently unauditable. And that is what Dr. Stark

1 testified. That if you had a one -- he talks about this one
2 vote margin. If there is one voter on a BMD in there, he says
3 I can't confirm the outcome with my statistical formula. It is
4 just an absurd premise to take.

5 As Dr. Gilbert put it, a separate but unequal system.

6 Your Honor, this is what brings us to the important
7 policy decisions. This is what is going on down the street.
8 When we talked about this at summary judgment, I suggested to
9 Your Honor that this is a debate that needs to be happening
10 under the gold dome a few blocks away. It is a debate that is
11 happening under the gold dome a few blocks away.

12 It is the arena in which the legislature -- the
13 legislators can consider the appropriate factors and issues
14 relative to implementing these important policy decisions.

15 And finally, Your Honor, I want to talk about
16 something that was brought up in plaintiffs' argument about
17 this idea of chaos. It is no secret we are headed in -- we are
18 in the midst of yet another contentious presidential election
19 cycle.

20 The idea that *Purcell* has some outer limit of
21 five months, while all of these 159 counties -- not only are
22 they going to now decide -- if the Court grants the relief, not
23 only are they now going to decide what kind of system they want
24 to use, train their employees on it, implement it, and run a
25 presidential preference primary, a general primary, two special

1 elections as of right now and a November general election -- it
2 is just nonsensical.

3 The idea that the chaos will be, you know, brought
4 about by not ordering something, it skips the step of saying,
5 look, this is the most battle-tested and stress-tested election
6 system in the country, without a doubt.

7 Your Honor knows what occurred in the 2020 primary.
8 We rolled out an entirely new statewide voting system in the
9 midst of COVID. All the poll places moving around. And we get
10 to the 2020 election, and we have got the closest election that
11 we have seen in decades.

12 The President of the United States calling my client,
13 demanding that he find votes, a complete hand count of the
14 election and rolled right into another contentious election in
15 2022. Your Honor, the idea that this system -- chaos would
16 result. That we have already seen what happens when you
17 stretch it to its limit but that we can come up with something
18 entirely new, creates a serious, serious logical fallacy.

19 Your Honor, I want to end -- I know I'm running short
20 on time -- on a note from the National Academies report. Your
21 Honor has heard this before. That by the time this committee
22 met for the first time in April of 2017, it was clear the most
23 significant threat to American elections was coming not from
24 faulty or outdated technologies, but from efforts to undermine
25 the credibility of the elections.

1 And, Your Honor, I do not mean to ascribe ill intent
2 to any plaintiff in this room. But the fact of the matter is,
3 the claims and the outlandish nature of the claims have taken
4 on a life of their own, just as we discussed in a hearing in
5 this courtroom back in November of 2021. And that is simply
6 where we are. But it has come full circle.

7 Because as Your Honor will recall, this case began
8 with the plaintiffs alleging the Georgia's Sixth Congressional
9 District voters can never know who was legitimately elected on
10 June 20th, 2017, to become their representative in the 115th
11 Congress. They know only the output of an undeniably
12 compromised voting system that, according to plaintiffs and
13 many of the nations most qualified experts, generated a result
14 that cannot reasonably be relied upon. To declare that result
15 to be the will of the voters as the defendants have done is to
16 engage in farce.

17 That is how this case started as an election contest
18 challenging the election of Karen Handel over then candidate,
19 now Senator, John Ossoff. And, Your Honor, I respectfully
20 submit we don't need to go back there by trying to find a
21 remedy to -- or imposing a remedy that they want and then
22 finding a burden after the fact to match it.

23 Thank you.

24 THE COURT: Thank you very much.

25 Mr. Cross, are you handling all of the rebuttal?

1 MR. CROSS: I think so. Unless Mr. Oles has
2 something, the plan is for me to do it. I'm sure Mr. McGuire
3 will yell at me if I miss something.

4 If you would give me just a moment.

5 THE COURT: Okay.

6 CLOSING ARGUMENT

7 MR. CROSS: If it please the Court.

8 THE COURT: Yes.

9 MR. CROSS: Mr. Miller said the Court could enjoin
10 the State from enforcing 21-2-300. Well, it is good that we're
11 agreed on that. To be clear again, that is not what we're
12 asking. What we're asking is to enjoin the particular ICX
13 machines and the printers that the Secretary selected and has
14 imposed on the voter. It is that simple.

15 They argue uniformity is a major interest. The
16 legislature has identified the backup system in place that they
17 have the option to go to, that the counties themselves should
18 be free to choose. It is a uniform system.

19 Now, we've heard a lot about how seriously officials
20 take the issues here. We heard that State officials uniformly
21 take incredibly seriously their role in protecting the right to
22 vote in Georgia. That may well be true, Your Honor. But we
23 didn't have election officials coming in and talking through
24 that. Again, not one election official identified a single
25 moment in time where they made any decision addressing any of

1 the issues that have been raised in this case.

2 They say we're casting aspersions. It is not an
3 attack on anyone's character. It is just a dereliction of
4 duty. And that is what we allege in every constitutional case
5 throughout the history of the great nation. Sometimes state
6 officials, no matter how well intended, and no matter how
7 qualified they may be to do lots of things they do, fall short,
8 in any variety of reasons. So for example, Your Honor, when I
9 said, looking at the board we had earlier, that people at the
10 State were making these decisions on election security, which
11 includes cybersecurity as Mr. Sterling said, were not competent
12 to make that decision, my point is they don't have the computer
13 science competency. I'm not addressing their competence as
14 individuals. There is a very particular competency that
15 Mr. Sterling identified that is part of that.

16 And I checked the transcript. At no point did I call
17 anyone inept. I'm not quite sure where that is coming from. I
18 want to be really clear. We're not attacking anyone's
19 character. It is just they have a duty to do certain things
20 and we have shown that they haven't done it, Your Honor.

21 On the generalized grievance, Your Honor, I'll just
22 direct Your Honor to the decision out of the Eleventh Circuit,
23 Judge Pryor I think was the one who wrote it, where he talks
24 about the historical U.S. Supreme Court case and he
25 acknowledges the poll tax. A poll tax that applied to everyone

1 across the board the Supreme Court found was unconstitutional
2 and an unconstitutional burden.

3 By their standard that is absolutely a generalized
4 grievance. There is no shortage of voting cases throughout the
5 history of the country where the court found the fact that
6 everyone is suffering the same harm does not render it -- does
7 not leave the people without standing.

8 Now let's be clear. They continue to get our case
9 wrong. We have heard repeatedly that our injury is we have to
10 know our vote was counted as cast, we don't know if our ballot
11 counted accurately. We have been very precise. The injury is
12 that when you use this machine as it is configured, as it is
13 used in the state, the voter has no way to know if the ballot
14 of record reflects their selections. They can't confirm that
15 QR code that is tabulated. As we have seen, they cannot
16 confirm in the human readable text.

17 We have heard no justification of that burden at all.
18 And, in fact, if we talk about the State interest that they
19 identified, there was a slide that Mr. Miller put up that
20 talked about the State interest, none of those State interests
21 have anything to do with what we're talking about. Because on
22 that slide, it is all Mr. Sterling talking about what it would
23 cost and the burdens of updating the system to 5.17. We're not
24 asking for that. No one has offered 5.17 as a mitigation.

25 Candidly, we thought that's where they were going to

1 go and why we filed our motion. We might ultimately withdraw
2 it. They have not offered it as a mitigation. They have told
3 you they can't even do it. So the State interest they offer is
4 not responsive to us as at all. Because if you eliminate the
5 ICX and the printer, you don't need 5.17 on the ICX or the
6 printer and all of that disappears.

7 They also -- on the point of -- their other state
8 interest is uniformity. Again, it would be a uniform backup
9 system.

10 Their other is cost. There is nothing in the
11 evidence here on the cost of doing what we have asked to do.
12 Mr. Sterling is a CFO. He knows how to build robust cost
13 documents. No one brought that in to the Court, Your Honor.

14 A lot about *Powell, Wood*. I'll just say those are
15 election cases on election outcomes. This is not that.

16 They talked how the Coalition exists only to
17 litigate. That is not accurate. What we didn't hear was the
18 Eleventh Circuit's finding that the Coalition has
19 organizational standing. None of the facts have changed from
20 what the Eleventh Circuit held. That is binding, respectfully,
21 Your Honor.

22 THE COURT: Well, an argument was made that -- that I
23 know you heard that, of course, you have to prove standing and
24 many other things, of course, again and again and again, as you
25 are going through the course of litigation.

1 MR. CROSS: Right.

2 THE COURT: I mean, so that was the argument that
3 simply he couldn't just say it was the law of the case under
4 the circumstances --

5 MR. CROSS: Right.

6 THE COURT: -- since it is a fundamental
7 jurisdictional requirement.

8 MR. CROSS: Exactly right. That's why I wasn't
9 arguing the law of the case. The point I was making, they
10 haven't argued that any of the facts the Eleventh Circuit found
11 were sufficient for standing that those facts are no longer in
12 the record. That is my --

13 THE COURT: That is what you are arguing?

14 MR. CROSS: Yes. Those facts still stand unrefuted
15 in the record.

16 There was a claim that there are differences in the
17 relief between Curling Plaintiffs and Coalition Plaintiffs. No
18 differences were identified. There are not.

19 We also heard that in our complaints that we say you
20 have to presume that the machines are hacked. We checked, just
21 to confirm, that does not appear. In fact, we could not find
22 the word hack in our complaints at all.

23 They say that our case is the next logical step of
24 the *Pearson* and *Kraken* case. We will try not to take offense
25 to that. It doesn't make any sense, Your Honor.

1 They said that -- this is the point about us
2 presuming a hack. Again, we have not alleged any past hack or
3 any past vote being flipped. And they say that is dispositive,
4 but it is not.

5 We heard from witnesses on the stand. We all know
6 it. Your Honor knows from common experience. Sometimes
7 computers fail. Sometimes people get access to computers in
8 the way they shouldn't. The fact that something may have
9 worked a million times in the past, tells us nothing about
10 whether it is going to work in the future, particularly when
11 you have here, the CISA findings that stand unmitigated.

12 And on that, Your Honor, I say a lot of respect for
13 Mr. Belinfante walking through the CISA mitigations. The
14 problem is nothing he said is evidence. He didn't cite Your
15 Honor to a witness who did that. Not one expert did that. Not
16 one State witness. There is no official that came in and said
17 we sat down with all the right people and thought through all
18 of this and here are the mitigations.

19 So nothing he said Your Honor can even consider. It
20 is argument. It is not evidence. We should have heard that
21 during the course of the trial.

22 They tell the UGA report, 80 percent reviewed. It is
23 80 percent of five seconds. It is meaningless.

24 On the review point, they say that we attack the UGA
25 study. We embraced the study. We think it is devastating for

1 them. In fact, the only one who attacked it was when they
2 argued that it was not peer-reviewed.

3 We argued that it is still quite reliable. Again, we
4 heard a lot about scientific standards. Their experts talked
5 about software independence. And they have not met that
6 standard themselves. And we have shown through the words of
7 their own experts that when voters don't and can't verify the
8 ballots, it is not software independent.

9 On the policy of whether they're keeping counties
10 from making their own decisions on whether to use these
11 machines or not, Mr. Belinfante said that Mr. Sterling
12 testified he was unaware of the policy that Mr. Harvey
13 articulated in 2018. That is not quite exactly what he said.
14 What he said was he was unaware whether that policy had
15 changed.

16 As the second-most senior official in the office and
17 the most senior official in this trial, certainly if it had
18 changed, one would expect him to know that, because that would
19 be a major position change. And there is no evidence that they
20 have communicated a different decision to the counties.

21 THE COURT: I'm sorry. The policy being?

22 MR. CROSS: The policy being when Mr. Harvey sent an
23 email -- or a memo actually, to the counties in 2018 saying we,
24 the State, will decide when it is unsafe to use the machines
25 under the statute that says actually the county superintendents

1 make that decision.

2 THE COURT: All right.

3 MR. CROSS: His testimony wasn't that he simply
4 didn't recall it. He said he wasn't aware of that being
5 changed. So as that stands in the record, that is the only and
6 last communication to the counties. Again, we do have Ryan
7 Germany's email saying explicitly the counties cannot change,
8 update, or alter the equipment without the State's permission,
9 which is entirely consistent with what Mr. Harvey had conveyed.

10 We have heard about the difficulty of making any kind
11 of change. But the evidence doesn't support that.

12 Mr. Sterling said in the -- in ten months they rolled out an
13 entirely new system, from the point of taking possession of
14 30,000 ICX, 30,000 printers, training, and everything. They
15 got it all done in ten months, including, as we have heard,
16 during a global pandemic.

17 Well, we have about ten months until the November
18 election. What we're asking for is far simpler. Just remove
19 the ICX, remove the printer, and go forward with everything
20 else you have, which they are supposed to be ready and trained
21 on under the statute for the backup system.

22 Secretary Raffensperger told Congress they actually
23 rolled the system out in six months. If they can roll out a
24 whole new system in six months, they can remove some equipment
25 in a fraction of that time.

1 Briefly on the disability point, Your Honor, this one
2 hits hard, the notion -- this whole notion of separate but
3 equal. The references today to disabled people, as one of the
4 probably only people in this room with a disability, let's just
5 say that voters and individuals with disabilities have been
6 exploited enough. And there has been no suggestion in this
7 case through its history that this was in any way a significant
8 decision-maker here.

9 The last point I'll say on this is that Blake Evans
10 testified that in Florida voters did what we're asking. He
11 also admitted that even in Georgia voters with disabilities are
12 already voting on different equipment. The argument has no
13 merit.

14 They say we're asking to update their own policies
15 because Dr. Halderman said so. We're not actually asking them
16 to update any policy because we have never seen a policy that
17 defends what they are doing. There is no written policy they
18 have provided the Court. And more importantly, it is CISA that
19 said you need to do this. It is not simply Dr. Halderman. As
20 they told you, they simply choose when they listen to CISA or
21 Fortalice or Dominion and when they don't.

22 And importantly, not one expert has ever examined
23 this equipment and endorsed it. That should be fatal. If it
24 was just a policy disagreement, if it was just at the margins
25 of is it reliable or is it not, they should bring in at least

1 one expert who has looked at it and says it is fine.

2 The only expert we know retained by the State that
3 actually examined the equipment to do hacking, they withheld
4 that report. Regardless of what Your Honor rules on that, at
5 the very least, I think we can all infer that they withheld it
6 for a reason. If it was helpful to them, we no doubt would see
7 it.

8 The response on hacking is to hold up their
9 Demonstrative 3. Again, Your Honor, as Mr. Sterling said, that
10 is not going to be accepted in any scanner in any precinct. It
11 is just a made-up false equivalence. It is not a real ballot
12 that would ever get tabulated. The overvote would get kicked
13 back, and the voter would be able to fix it.

14 The other point is when they are talking about
15 hacking paper ballots, this was clear from all of the witnesses
16 including their experts. It is only after it is tabulated.
17 Because the chain of custody is the voter controls it until it
18 is tabulated. And so that means, even if you can alter it, it
19 has got to be an insider, not someone from the random public,
20 not an outsider like Coffee County, the people who came in and
21 it has already been scanned.

22 So at the very least, you have an image that you can
23 compare to that. And so someone would have to hack the paper
24 ballot and hack the scanner to alter that, which is obviously
25 more difficult than just hacking the BMD with a hack that would

1 not be detected.

2 Briefly on VVSG 2.0, Your Honor, I don't think it is
3 a huge point, but it is worth noting. But again, Dr. Adida
4 went to EAC and said that all machines should be using this
5 today because, as he said, the current standard goes back
6 before the iPhone was created. There was a suggestion that
7 this wasn't available at the time, the 5.17, if they were to go
8 there. But actually, Your Honor, 5.17 was submitted in October
9 of 2022. VVSG 2.0 was adopted in October of 2021. Mr. Evans
10 testified to that.

11 THE COURT: And it provides for what? Just remind
12 me.

13 MR. CROSS: It has higher standards, one of which in
14 particular is penetration testing. So it would be an EAC
15 standard that voting equipment would have to survive
16 penetration testing. Basically what they did, with Fortalice
17 with the BMD and the report that we have not seen, it is
18 hacking to figure out, is it hackable? Can you penetrate? The
19 kind of stuff Fortalice has done in the past. But it would be
20 required on voting equipment, which has not yet been required.

21 The seals, the missing seals and the broken -- we
22 heard it was two emails. It is a lot more than that. Your
23 Honor can review the evidence.

24 We heard that Mr. Barnes on -- that they have
25 physical security, we heard, because now they burn CDs. But

1 that didn't happen until the end of 2023. That is new. So all
2 of the equipment has been used without that measure for years.

3 We heard about Mr. Barnes' mentioning hash testing.
4 Your Honor actually struck that because he did not have the
5 foundation. He has no cybersecurity training. So he could not
6 speak to the efficacy of hash testing. The people who have are
7 Dr. Halderman and Kevin Skoglund. So even if the team is
8 miss -- misremembering and that is actually in evidence, the
9 only person with -- the only people with the expertise to speak
10 to that have said it is easily circumvented.

11 We heard about Mr. Schoenberg's testimony that he
12 said he didn't review the ballot because there was no point
13 because he doesn't believe in the machine. That is not what he
14 said. At Volume 1 at Page 88, he was asked why he didn't
15 review it. He said, probably some combination of forgetting
16 and I will tell you, a psychological sense that you are done
17 when the machine prints your ballot and you are finished
18 expressing your vote. He is not alone.

19 Blake Evans at Volume 2, Page 244, as the State
20 election director, said, yes, that is something we know about.
21 That happens.

22 That with this ICX the way it works, voters often
23 think like the old DRE they cast their ballot and then they are
24 done and the paper ballot is something they take with them. It
25 is another burden imposed on the voter to have to remember, no,

1 I actually have to review this and I have to tabulate it, which
2 they know they have to do if it is there marked by hand.

3 We keep hearing that Joseph Kirk is the only county
4 election supervisor to testify. That is not right. Blake
5 Evans testified. And he testified about how easy and seamless
6 hand-marked paper ballots with a BMD for accessibility is in
7 Florida.

8 We also heard from James Barnes as a county election
9 supervisor, who had testimony in important ways, was not
10 consistent with what we heard from state officials about their
11 investigation.

12 We also heard from Misty Hampton, as a State -- as a
13 county election supervisor. Obviously, an example of how you
14 can't simply rely on an oath, which we heard a lot about as a
15 measure of protection.

16 On what the Secretary's office knew in May of 2021.
17 We heard that the puzzle I put up meant that the Secretary of
18 State should have known about the breach. To be quite clear,
19 that is not the point of the puzzle. The point of the puzzle
20 is they should have investigated. That given everything that
21 they knew in that puzzle, in May of 2021, State officials that
22 are taking election security seriously at the level of your
23 duty would have done more than a short phone call to James
24 Barnes and then stick the EMS server in a closet and walk away,
25 which is the testimony of Mr. Michael Barnes.

1 And again, James Barnes says he never heard from the
2 State at all. The point is not that they should have known but
3 they should have investigated and then they would have known.

4 We did not say that Blanchard -- Investigator
5 Blanchard should have known who Lenberg was when he ran into
6 him in the office in January of 2021. Our point is that when
7 he came in investigating a county already for election
8 misconduct and he found someone in the office with the only
9 access to the EMS server room, particularly what was known at
10 that time about individuals trying to get access to county
11 equipment -- you remember Mr. Willard, the State's lawyer, just
12 weeks before talked about how Sidney Powell's minions were
13 trying to do that -- it should have a big red flag that a
14 stranger was in that office.

15 But again, what this shows is the officials
16 responsible for election security are not taking their duties
17 seriously enough to protect the system when they say physical
18 security is what we need.

19 Briefly on Coffee County, Your Honor, we're not
20 saying the evidence of Coffee County renders the ICX
21 unconstitutional. It is in very significant part a direct
22 rebuttal to their defense that things like physical security,
23 chain of custody, training, and an oath protect the system.

24 Coffee County shows those things cannot be relied on.
25 And that is their only defense as to why they have not done

1 what CISA said with the serious vulnerabilities in place. If
2 that is your fallback, it is not a reliable fallback.

3 The other significance of Coffee County as Kevin
4 Skoglund and others testified, Dr. Halderman, is that by having
5 that software out in the wild for years, we're now in a
6 position which is exactly what Mr. Willard said on behalf of
7 the State: It is the proverbial keys to the kingdom and risk
8 is that those people now are looking to do something in the
9 future, which is exactly what he said.

10 THE COURT: I think you're at 20 minutes and a little
11 bit.

12 MR. CROSS: Okay. If I could pick like two points.

13 THE COURT: Two points but not more than 30 seconds.

14 MR. CROSS: I'm almost done.

15 THE COURT: I won't -- when you are quiet, I won't
16 count that against you.

17 MR. CROSS: Last point then, Your Honor.

18 We heard the only witness who talked about the burden
19 of doing what we've proposed, which would be hand-marked paper
20 ballots and a BMD for accessibility, was Mr. Kirk. He said it
21 would be difficult, expensive.

22 But as Mr. Belinfante acknowledged, that is not
23 actually right. What Mr. Kirk was responding to was a
24 question, when Mr. Belinfante acknowledged, it would be BMDs
25 and hand-marked paper ballots in equal use. So you would have

1 to have a lot of BMDs and a lot of hand-marked paper ballots.

2 They don't have any election worker who is saying
3 what we propose, what Dr. Adida endorses, and what Blake Evans
4 says works great in Florida would be in any way difficult or
5 costly at the level to warrant the burdens.

6 The last point, Your Honor, that I will make is the
7 scalability point because we've heard a lot about hacking
8 BMD -- I'm sorry, hacking paper ballots. The degree to which
9 paper ballots can be hacked versus the BMD ballots is massively
10 different. It is exactly what CISA says that things like
11 malware and other manipulations can propagate through the
12 system. And it allows you to alter ballots on a massive scale.
13 It also can be done by voters, members of the public. On the
14 hand-marked paper ballot side, again, it is an insider that has
15 to do it. They have told you --

16 THE COURT: I have heard that. So I'm going to -- as
17 a matter of fairness, I'm going to --

18 MR. CROSS: Okay. That's it. Thank you, Your Honor.

19 THE COURT: -- end at this point.

20 Thank you very much. Excellent arguments. Really
21 superb. I won't say they were never redundant. But they were
22 creative and well-divided. Thank you very much.

23 Would you-all confer between yourselves about what
24 you want to do about proposed findings of fact and conclusions
25 of law and a time schedule? Then if you have a problem, you

1 know, send -- if you agree, send me the proposal.

2 And the one thing I would say is one of the reasons
3 the summary judgment motion that you filed took so long to
4 resolve, besides the fact that I was trying to do the fee order
5 that I didn't get to finish, was they were so long and complex.
6 And I realize the case is long and hard.

7 But anything you can do to make them a little bit
8 more manageable, which is not necessarily easy. But don't send
9 me 5 million extra materials, et cetera.

10 And no matter what, we would want a Word version.
11 And if you're thinking about you're going to have responses to
12 proposed findings of fact and conclusions of law, that will
13 take us forever and you forever. So I do not encourage that at
14 this juncture.

15 I mean, there is a way in which the case has gotten
16 dragged down simply by the fact of the volume of the evidence.
17 So let's try to avoid that.

18 I'm anticipating you are all going to get back --
19 some of you are going to get back to me about that outstanding
20 matter with the consulting expert, et cetera.

21 MR. KNAPP: Yes, Your Honor.

22 THE COURT: And I'm available if you do it -- if
23 you're going to do that relatively soon, I'm available until
24 Wednesday afternoon, but then I'm not available until the next
25 week.

1 And then we will work on the one other outstanding
2 matter that we discussed in the morning.

3 Is there anything else we need to address?

4 MR. TYSON: Not for the defendants, Your Honor.

5 MR. BROWN: Not for the plaintiffs, Your Honor.

6 THE COURT: Anything from you, Mr. Oles?

7 MR. OLES: Not that I'm aware of, Judge.

8 THE COURT: Okay. You-all went through the evidence
9 also with Harry before so that things are organized or not?

10 MR. BROWN: I believe so, yes, Your Honor.

11 THE COURT: You did both have a great document
12 management team, I have to say. And they work like a team.
13 Though on different sides, they were just marvelous. And I
14 know that Harry so enjoyed working with them. Bravo to them as
15 well.

16 MR. OLES: Judge, I think I do. I owe you a response
17 on the -- about --

18 THE COURT: -- Governor Kemp's report, that he
19 referenced what the document was and he can send that in.

20 MR. RUSSO: Your Honor, I think we also owe you a
21 response on 5.17 exclusion unless the plaintiffs are --

22 THE COURT: Unless you-all agree. I think you'll
23 talk about that.

24 MR. CROSS: Sorry. With closing, we haven't talked,
25 but we will.

1 THE COURT: Okay.

2 MR. TYSON: And, Your Honor, one other just
3 logistical detail. If we clear everything out of the courtroom
4 tonight and put it into the rooms, can we clean those out
5 tomorrow? Will that work?

6 THE COURT: Sure. Of course.

7 MR. TYSON: Thank you.

8 THE COURT: You can get in and out, I assume. But
9 anyway if somebody gets locked out, we'll -- I'll get somebody
10 up here since Harry won't be here tomorrow either. He was sure
11 that you were going to be through by the day he took -- and I
12 was not so sure but I said it is okay. He does an incredible
13 job. So I'm grateful for him for everything.

14 Okay. Well, I don't know what you-all have planned
15 for your lives for the next few days. I hope you're going to
16 have a life and that you're going to give your brain some --
17 some breathing room and some attention to your children.

18 And I would like to know when Dr. Halderman's baby is
19 born also since it is always an exciting thing. I always try
20 to find out about your baby -- the babies on defendants' side,
21 which seem to be rolling out all the time.

22 MR. MILLER: Your Honor, I have heard there is a
23 population crisis.

24 THE COURT: Well, obviously there are two of you
25 firmly committed to addressing that.

1 So -- well, thank you, everybody. Have a wonderful
2 afternoon that is left. At least we have some sun for a while.
3 It has been a fascinating day.

4 And farewell. We are through.

5 COURTROOM SECURITY OFFICER: All rise. Court is in
6 recess.

7 **(The proceedings were thereby concluded at 4:24**
8 **PM.)**

C E R T I F I C A T E

UNITED STATES OF AMERICA

NORTHERN DISTRICT OF GEORGIA

I, SHANNON R. WELCH, RMR, CRR, Official Court Reporter of the United States District Court, for the Northern District of Georgia, Atlanta Division, do hereby certify that the foregoing 184 pages constitute a true transcript of proceedings had before the said Court, held in the City of Atlanta, Georgia, in the matter therein stated.

In testimony whereof, I hereunto set my hand on this, the 2nd day of February, 2024.



SHANNON R. WELCH, RMR, CRR
OFFICIAL COURT REPORTER
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
OFFICIAL CERTIFIED TRANSCRIPT

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